# OPINIONS

OF THE

# ATTORNEY GENERAL

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## OPINION NO. 68-003

**Syllabus:**

A municipality may not spend that portion of gasoline and motor vehicle tax monies segregated as prescribed by Section 5735.28, Revised Code, to purchase, erect, or maintain traffic lights and signals on state highways.

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**To: Roger Cloud, Auditor of State, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, January 8, 1968**

You request my opinion concerning the following question:

> "May both charter and noncharter municipalities spend that portion of gasoline and motor vehicle tax monies segregated as prescribed by Section 5735.28, Revised Code, for the purchase, erection and maintenance of traffic lights and signals on state highways?"

Section 5735.28, Revised Code, provides as follows:

> "Wherever a municipal corporation is on the line of the state highway system as designated by the director of highways as an extension or continuance of the state highway system, seven and one half percent of the amount paid to any municipal corporation pursuant to sections 4501.04, 5735.23, and 5735.27 of the Revised Code, shall be used by it only to construct, reconstruct, repave, widen, maintain, and repair such highways and to erect and maintain street and traffic signs and markers on such highways."

Wherever the legislature has authorized the expenditure of funds for "traffic lights and signals," it has expressly said so. Hence, in several related sections of the Revised Code, the legislature has provided that certain funds may be spent for a number of enumerated purposes, among which are "street and traffic signs and markers" as well as "traffic lights and signals." See Sections 4501.04, 5735.23, 5735.25, 5735.27 and 5735.29, Revised Code.

These phrases have been used in their popular sense to denote two different categories, the former referring to devices which convey a specific message by words or symbols, and the latter being restricted to lights used to control the movement of traffic. Somewhat more definitive are the phrases the legislature has used in the traffic laws to distinguish traffic lights and signals from other types of traffic control devices, Section 4511.01 (OO) and (PP), Revised Code.

Section 5735.28, Revised Code, includes no express authority "to purchase, erect, and maintain traffic lights and signals." The legislative intent clearly restricts the spending of that money allocated pursuant to this section only for those purposes enumerated therein.

It is my opinion, therefore, that a municipality may not spend that portion of gasoline and motor vehicle tax monies segregated as prescribed by Section 5735.28, Revised Code, to purchase, erect, or maintain traffic lights and signals on state highways.

## OPINION NO. 68-004

**Syllabus:**

A regional council of political subdivisions organized and operating by virtue of Sections 167.01 through 167.08, Revised Code, has the power to enter into a contract with the federal government where it contributes cash or professional or technical services as part consideration for accepting funds, grants, gifts or other services from the government of the United States.

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**To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio**
**By: William B. Saxbe, Attorney General, January 9, 1968**

I have before me your request for my opinion on whether a regional council of political subdivisions organized and operating by virtue of Sections 167.01 through 167.08, Revised Code, has the power to enter into a contract with the federal government as part consideration for accepting funds, grants, gifts or other services from the government of the United States.

Subsection (B), Section 167.06, Revised Code, permits a council to accept funds, grants, gifts, services from the government of the United States or its agencies, from this state or its departments, agencies, instrumentalities, or from political subdivisions or from any other governmental unit whether participating in the council or not, and from private and civic sources.

40 U.S.C.A. Sections 460 and 461 (g) state that the Administrator of the Housing and Home Finance Agency (now the Secretary of Housing and Urban Development) is authorized to make grants to organizations composed of public officials whom he finds to be representative of the political jurisdictions within a metropolitan area or urban region for the purpose of assisting such organizations to undertake studies, collect data, develop regional plans and programs and engage in such other activities as the Administrator finds necessary or desirable for the solution of the metropolitan or regional problems in such areas or regions.

A grant under this subsection shall not exceed two-thirds of the estimated cost of the work for which the grant is made.

Planning Agency Letter No. 50 dated August 16, 1965 issued by the Housing and Home Finance Agency, Urban Renewal Administration, Washington, D.C., states that the remaining one-third of the cost of the work may be met by the applicant in the form of cash or professional and technical services contributed by the jurisdictions comprising the membership of the organization.

This agency also has issued a General Instructions and Check List manual in which are coded certain items to be submitted with the council's application for a grant. Under Code UP 101, the applicant must submit legal documentation establishing authority of the applicant to perform the planning work.

The same manual in Section 2 Legal Data 1 (d), Page 3-2, requires documentation "Empowering the applicant to contract with the United States for the purpose of receiving and expending Federal funds. If copies of the laws cited are not available in printed compilations, the Planning Agency shall submit true copies."

It is evident, therefore, that in order to qualify for a federal grant, regional councils of political subdivisions must have the power to contract with the Housing and Home Finance Agency. (H.U.D.)

Section 167.03, Revised Code, reads as follows:

> "(C) The council may, by appropriate action of the governing bodies of the members, 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."

Therefore, if the individual members can contract with the United States Government for grants-in-aid, the statute authorizes the councils to do likewise.

Subparagraph (A), Section 167.02, Revised Code, describes the members of regional councils of political subdivisions as follows:

> "Membership in the council shall be the counties, municipal corporations, townships, special districts, school districts and other political subdivisions * * *"

Section 167.03, Revised Code, provides as follows:

"(A) The council shall have the power to:

" * * * * * * * * *

"(2) Promote cooperative arrangements and co-ordinate action among its members, and between its members and other agencies of local or state governments, whether or not within Ohio, and the federal government;"

Therefore, the council itself can draft a cooperative arrangement between its members and the federal government.

It is fundamental that mutual consent is essential to every agreement, and that as a rule there can be no binding contract where there is no real consent. 11 O. Jur. 2d 261, Contracts, Section 17.

If there is no consideration for a contract, there can be no mutuality. 11 O. Jur 2d 258, Contracts, Section 11.

Therefore, if a "cooperative arrangement" made between the parties set forth by Section 167.03, Revised Code, supra, is drafted by the council, with one-third funds or services promised by the members as consideration in exchange for the promise of the United States Government, and there is a co-operative intent demonstrated by the members in the form of written mutual manifestations of assent, it will be deemed a contract.

Furthermore, Section 713.21, Revised Code, states that:

"* * * The regional planning commission may accept, receive, and expend funds, grants, and services from the federal government or its agencies, from departments, agencies, and instrumentalities of this state or any adjoining state or from one or more counties of this state or any adjoining state or from any municipal corporation or political subdivisions of this or any adjoining state, including county, regional, and municipal planning commission of this or any adjoining state, or from civic sources, and contract with respect thereto, * * *"

Such power to contract further was approved for regional planning commissions by my predecessor in Opinion No. 5678, Opinions of the Attorney General for 1955, at page 423.

The members of a regional planning commission are defined in Section 713.21, Revised Code, as follows:

"The planning commission of any municipal corporation or group of municipal corporations, any board of township trustees, and the board of county commissioners of any county in which such municipal corporation or group of municipal corporations is located or of any adjoining county may co-operate in the creation of a regional planning commission, for any region defined as agreed upon by the planning commissions and boards, ex-

clusive of any territory within the limits of a municipal corporation not having a planning commission."

It therefore appears that certain members of a regional planning commission, as, for example, boards of county commissioners, who are the executive officers of a "county", or township trustees are identical to certain members of regional councils of political subdivisions, as described in Section 167.03, Revised Code, supra.

The power to contract with the federal government provided by Section 713.21, Revised Code, supra, to individual members of a regional planning commission, is by application of Section 167.03 (C), supra, authority for a regional council of political subdivisions to so contract.

It is therefore, my opinion and you are hereby advised that a regional council of political subdivisions organized and operating by virtue of Sections 167.01 through 167.08, Revised Code, has the power to enter into a contract with the federal government where it contributes cash or professional or technical services as part consideration for accepting funds, grants, gifts or other services from the government of the United States.

## OPINION NO. 68-007

**Syllabus:**

Under Section 7 (D) of Amended Substitute Senate Bill No. 350 each nonteaching employee of a city, exempted village, local, county, or joint vocational school district shall receive an increase in compensation of ten cents an hour to a maximum of two thousand eighty hours per year and no such employee shall receive an increase of less than one hundred dollars per year. Furthermore, if a school district is unable to comply with Section 7 (D) of Amended Substitute Senate Bill No. 350 because of lack of funds, then under the provision of Section 9 of Amended Substitute Senate Bill No. 350 the school district should request an additional subsidy from the State Department of Education.

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**To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio**
**By: William B. Saxbe, Attorney General, January 10, 1968**

I have before me your communication concerning Senate Bill No. 350 which reads as follows:

> "We understand that all regular, non-certificated employees must receive a minimum of $100.00, and it is provided that: 'each regular nonteaching employee shall receive an increase in compensation of ten cents per hour to a maximum of 2,080 hours

per year, provided that no employee shall receive an increase of less than $100.00 per year.'

"1. Does this mean that each non-certificated employee shall receive a basic $100.00 per year salary increase?

"2. In addition to the $100.00, does a non-certificated employee receive ten cents per hour more if he works more than 1,000 hours?

"3. Suppose a non-certificated employee works 2,080 hours and the employer board of education does not have the funds to pay $208.00 in addition to his regular salary--what then?"

Section 7 (D), Amended Substitute Senate Bill No. 350 reads as follows:

"For school years 1967-68 and 1968-69, each city, exempted village, local, county, and joint vocational school district shall spend for increased salaries for noncertificated employees an amount equal to eighty dollars times the number of approved classroom units for the school district, in addition to payments made pursuant to the compensation plan required by division (A) of this section for such noncertificated employees. Each regular nonteaching employee shall receive an increase in compensation of ten cents per hour to a maximum of two thousand eighty hours per year, provided that no such employee shall receive an increase of less than one hundred dollars per year. The increases in compensation made pursuant to this section may include plans established pursuant to section 3313.202 of the Revised Code. Increases in compensation authorized by this section shall not apply to employees whose wage rates are established in accordance with the procedures set forth in Chapter 4115. of the Revised Code."

The language of division (D) of this section clearly indicates that each nonteaching employee shall receive an increase in pay of ten cents an hour up to two thousand eighty hours per year and no employee shall receive an increase of less than $100 per year. It therefore follows in answer to your first and second question that each regular nonteaching employee must receive a basic one hundred dollar per year salary increase and in addition to the one hundred dollars, each nonteaching employee must receive ten cents per hour more if he works more than one thousand hours per year up to a maximum of two thousand eighty hours.

Your third inquiry involves the problem of what must a board of education do if it is unable to meet the requirements of Section 7, division (d) of Amended Substitute Senate Bill No. 350.

Section 9 of Amended Substitute Senate Bill No. 350 which provides for just such a contingency reads in part as follows:

> "In addition to all other payments authorized by this act, an additional payment shall be made to each school district which is unable to meet the requirements set forth in section 3317.13 of the Revised Code and division (D) of section 8 (sic) [Section 7] of this act, plus the employer cost of retirement incurred from such requirements, between September 1, 1967 and December 31, 1968. Any district which is eligible for payments under section 3317.02 of the Revised Code and which is unable to maintain the salary schedule required by section 3317.13 of the Revised Code and to comply with the requirements of division (D) of section 8 (sic) [Section 7] of this act, plus the employer cost of retirement incurred from such requirements, may request an additional subsidy to enable such district to meet these obligations. The request shall be made upon forms provided by the state department of education and shall be submitted before October 31, 1967. The amount to be paid to each qualifying district shall be determined by the department of education pursuant to rules established by the state board of education. Payments for the last four calendar months of 1967 shall be disbursed in a single payment in December, 1967.
>
> "Each district which is unable to comply with these requirements for calendar year 1968 may reapply to the department in the same manner as required for the initial application. The reapplication shall be made between January 1, 1968 and January 15, 1968. The department shall determine, pursuant to rules established by the state board of education, the amounts to be paid to each qualifying district between January 1, 1968 and December 31, 1968 and shall pay such amounts in twelve equal monthly installments beginning in January, 1968.
>
> "* * * * * * * * *"

If a noncertificated employee works two thousand and eighty hours and the employer board of education does not have the funds to pay him two hundred and eight dollars in addition to his regular salary, then the board should request an additional subsidy from the state department of education.

It is therefore my opinion and you are hereby advised that under Section 7 (D) of Amended Substitute Senate Bill No. 350 each nonteaching employee of a city, exempted village, local, county, or joint vocational school district shall receive an increase in compensation of ten cents an hour to a maximum of two thousand eighty hours per year and

no such employee shall receive an increase of less than one hundred dollars per year. Furthermore, if a school district is unable to comply with Section 7 (D) of Amended Substitute Senate Bill No. 350 because of lack of funds, then under the provision of Section 9 of Amended Substitute Senate Bill No. 350 the school district should request an additional subsidy from the State Department of Education.

## OPINION NO. 68-008

**Syllabus:**

1. A state supported college or university does not have the authority to enter into an agreement with an employee organization to grant higher pay ranges for classified employees, nor does it have authority, under Section 143.09 (M), Revised Code, to unilaterally grant higher pay ranges for classified employees until it has received approval from the state employee compensation board.

2. Under the provision of Section 143.09 (M), Revised Code, when requesting an increase in compensation for classified employees, a state college or university must submit separate requests to the state employee compensation board for particular classes of employees rather than submit a blanket request covering more than one class.

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**To: Wayne Ward, Director, Department of State Personnel, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, January 10, 1968**

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

> "Your opinion is respectfully requested on certain questions arising from the interpretation of Section 143.09 (M) and Section 143.01 of the Revised Code, both of which were recently enacted by amended Substitute House Bill 93 of the 107th General Assembly.
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> "The questions are as follows:
>
> "1. Does a state supported College or University have the authority to enter into an agreement with an employee organization to grant higher pay ranges for classified employees before it has received the approval of the employee compensation board?
>
> "2. Can a state supported College or University submit a blanket request covering more than one class for assignment to higher pay ranges or must it submit separate requests for particular classes?"

Section 143.09 (M), Revised Code, reads as follows:

> "With respect to officers and employees of state-supported colleges and universities, except for the powers and duties, of the state personnel board of review, the powers, duties and functions of the department of state personnel and the director of state personnel specified in Chapter 143. of the Revised Code are hereby vested in and assigned to the personnel departments of such colleges and universities. Section 143.09 of the Revised Code does not limit the authority of such colleges and universities with the approval of the state employee compensation board to compensate all employees in a particular classifieation at a pay range higher than that provided in section 143.09 of the Revised Code." (Emphasis added)

Section 143.101, Revised Code, establishes the state employee compensation board and provides, in pertinent part, that:

> "* * * The board shall have authority to assign any of the classes established by division (A) of section 143.09 of the Revised Code or established by the director of state personnel under division (C) of section 143.09 of the Revised Code to higher pay ranges, either on a state wide basis, in particular counties of the state, or at particular state institutions. The board shall have the authority to assign all of the classes established by section 143.09 (C) to lower pay ranges on a state wide basis if the board determines that such a lower assignment of all classes is advisable. The board may take action either upon request of an appointing authority or on its own initiative and employees, appointing authorities, and representatives of employee organizations shall have the opportunity to appear and offer evidence at any meetings of the board. * * *"

In Opinion No. 67-083, Opinions of the Attorney General for 1967, page 2-143, I considered the question of the authority of the Ohio State University to enter into a contract with a union, which contract would provide for wages, hours and certain other conditions of employment for university employees. In that opinion I advised that the Ohio State University may not enter into a contract with a labor union providing for wages, hours or other conditions of employment for University employees because there is no authority for the University to enter into such an agreement with a union for the reason that Sections 143.10 and 143.11, Revised Code, mandatorily provide for wages and hours of University employees.

In answer to your first inquiry, Section 143.09 (M), supra, provides that state supported colleges and universities must receive the approval of the state employee compensation board

in order to compensate all employees in a particular classification at a pay range higher than that provided in Section 143.09, Revised Code. Section 143.101, Revised Code, further provides that the employee compensation board shall have authority to assign any of the classes to higher pay ranges either upon the request of the appointing authority or on its own initiative.

Therefore, in accordance with Opinion No. 67-083, supra, it is clear that a state supported college or university does not have the authority to enter into an agreement with an employee organization to grant higher pay ranges for classified employees, nor does it have authority, under Section 143.09 (M), supra, to unilaterally grant higher pay ranges for classified employees until it has received approval from the state employee compensation board.

In answer to your second inquiry, Section 143.09 (M), supra, provides that such colleges and universities may, with the approval of the board, authorize compensation at a higher pay range to all employees in a "particular classification". Such language is a clear pronouncement that state colleges and universities must submit separate requests for particular classes rather than submit a blanket request covering more than one class.

Therefore, it is my opinion and you are hereby advised that:

1. A state supported college or university does not have the authority to enter into an agreement with an employee organization to grant higher pay ranges for classified employees, nor does it have authority, under Section 143.09 (M), Revised Code, to unilaterally grant higher pay ranges for classified employees until it has received approval from the state employee compensation board.

2. Under the provision of Section 143.09 (M), Revised Code, when requesting an increase in compensation for classified employees, a state college or university must submit separate requests to the state employee compensation board for particular classes of employees rather than submit a blanket request covering more than one class.

## OPINION NO. 68-013

**Syllabus:**

A political party formed pursuant to Section 3517.01, Revised Code, must have a state convention to nominate its presidential electors pursuant to Section 3513.11, Revised Code, and a national convention to nominate its presidential candidate, pursuant to Section 3513.12, Revised Code, in order for its candidate to have a place on the presidential ballot.

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**To: Ted W. Brown, Secretary of State, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, January 22, 1968**

I have received your request for my opinion wherein you inquire, in essence:

Does a political party formed subsequent to the primary election in a presidential election year acquire an inherent right to participate in the general election by virtue of Revised Code Section 3517.01 and, if so, by what means?

Section 3513.11, Revised Code, provides, in part:

> "At the state convention of each political party held in 1952, and in each fourth year thereafter, persons shall be nominated as candidates for election as presidential electors to be voted for at the next succeeding general election. Within five days after the holding of each such convention the chairman and secretary thereof shall certify in writing to the secretary of state the names of all persons nominated at such convention as candidates for election as presidential electors." (Emphasis added)

Section 3513.12, Revised Code, provides in pertinent part:

> "* * *The name of such first and second choice for nomination as candidate for the presidency of each candidate for election as such delegate or alternate shall be printed and appear on the primary ballots immediately below the name of such candidate in such a way as to clearly disclose the preference of each candidate. Each candidate for election as such delegate or alternate may also file along with his declaration of candidacy and certificate a statement in writing signed by him in the following form:
> Statement of candidate for election
>
> "as { delegate / alternate } to the (here insert name of political party) national convention.
>
> "I hereby declare to the voters of my political party in the state of Ohio, that, if elected as
>
> "{ delegate / alternate } to their national party convention
>
> I shall, to the best of my judgment and ability, support that candidate for president of the United States who shall have been selected at

this primary by the voters of my party in the manner provided in sections 3513.01 to 3513.32, inclusive, of the Revised Code, as their candidate for such office.

.....
delegate

For signature of candidate for

alternate"

Consistent with the above quoted Code sections is Section 3505.10, Revised Code, which provides in pertinent part:

> "In each of such enclosed rectangular spaces shall be printed the names of the candidates for president and vice-president nominated as such by the national convention of a political party to which delegates and alternates were elected in this state at the next preceding primary election. The names of candidates for electors of president and vice-president of any political party shall not be placed on the ballot, but shall, after nomination, be certified to the secretary of state as required by Section 3513.11 of the Revised Code. A vote for any of such candidates for president and vice-president shall be a vote for the electors of the political party by which such candidates were nominated and whose names have been certified to the secretary of state."
> (Emphasis added)

Section 3513.11, 3513.12, and 3505.10, supra, are fortified by the thrust of Section 7, Article V, Ohio Constitution, which provides, in part:

> "* * *All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority. (Adopted September 3, 1912)."
> (Emphasis added)

A complete perusal of the Revised Code and Ohio Constitution suggests no other method for nominating either a presidential candidate or presidential electors. In State ex rel. Beck v. Hummel, 150 Ohio St. 127 (1948), the Court held that a presidential candidate must have been nominated at his political party's national convention to have a place on the presidential ballot, but pursuant to Section 4785-91, General Code, which provided for the nomination of independent candidates for election, permitted his electors' names to be on the ballot, noting that the electors were independent state

officers. The substance of Section 4785-91, General Code, became Section 3513.27, Revised Code, which was subsequently repealed. This indicates a legislative intent to resolve the anomalous situation, presented in State ex rel. Beck v. Hummel, supra, and to restrict a political party's implementation of its right to have a place on the presidential ballot to that specifically delineated in the Revised Code.

Therefore, it is my opinion and you are advised that a political party formed pursuant to Section 3517.01, Revised Code, must have a state convention to nominate its presidential electors pursuant to Section 3513.11, Revised Code, and a national convention to nomin ate its presidential candidate, pursuant to Section 3513.12, Revised Code, in order for its candidate to have a place on the presidential ballot.

## OPINION NO. 68-015

**Syllabus:**

1. Amended Senate Bill No. 169 requires the creation of, appointment of members to, and the organization of, a county board of mental retardation in Darke County, notwithstanding the fact that the county department of welfare is administering Sections 5127.01 to 5127.04, inclusive, of the Revised Code under an agreement previously entered into with the county child welfare board pursuant to the provisions of Section 5153.06, Revised Code.

2. An agreement entered into by the county child welfare board and the county department of welfare pursuant to authority granted in Section 5153.06, Revised Code, so far as it relates to the transfer of the child welfare board's powers and duties regarding the administration and supervision of Sections 5127.01 to 5127.04, inclusive, Revised Code, is terminated upon the effective date of the repeal of the statute, Section 5153.161 [5153.16.1], Revised Code, under which the transferred powers and duties were vested in the county child welfare board.

3. Monies received from a tax levied pursuant to Section 5705.19 (L), Revised Code, for the maintenance and operation of schools, training centers or workshops for mentally retarded persons must be appropriated to the use of the Darke County Board of Mental Retardation.

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**To: John F. Marchal, Darke County Pros. Atty., Greenville, Ohio**
**By: William B. Saxbe, Attorney General, January 23, 1968**

Your request for my opinion states that the Darke County child welfare board entered into an agreement with the county department of welfare in January of 1967 whereby the child welfare board transferred its powers and duties to the county department of welfare. By this, I assume that the transfer was effected under the provisions of Section 5153.06, Revised Code, and that the powers and duties transferred were those

specified in Sections 5153.16 and 5153.161 [5153.16.1], Revised Code. In light of the recent enactment of Amended Senate Bill No. 169 (132 v S. 169), effective October 25, 1967, you pose the following questions:

> "(1) Since the County Department of Welfare of Darke County, Ohio, is now administering Sections 5127.01 to 5127.04 of the Ohio Revised Code under an agreement heretofore entered into by the Department and the former County Child Welfare Board which existed in this County under the provisions of Section 5153.06 of the Ohio Revised Code, does Amended Senate Bill No. 169 require the appointment of a County Board of Mental Retardation irrespective of this situation?
>
> "(2) In the event that your answer to question (1) is in the affirmative, does the provision in Amended Senate Bill No. 169 requiring that moneys received from levies be appropriated to the County Board of Mental Retardation (Section L, 5705.19) apply to our situation in Darke County, Ohio, where the County Welfare Department is supervising and administering Sections 5127.01 to 5127.04 of the Ohio Revised Code?
>
> "(3) In the event that your answers to questions (1) and (2) are both in the affirmative, what then would be the status of the County Welfare Department of Darke County, Ohio, as it relates to the agreement heretofore entered into wherein the County Child Welfare Board transferred its power and duties to the Welfare Department which Department is now performing said functions and duties?"

In considering your first question, recently enacted Section 5126.01, Revised Code, provides in pertinent part:

> "There is hereby created in each county a county board of mental retardation consisting of seven members, five of whom shall be appointed by the board of county commissioners of the county, and the other two shall be the probate judge of the county or his delegate and one other person appointed by him. Each member shall be a resident of the county. Of the five members appointed by the board of county commissioners, at least one shall be a parent of a mentally retarded person and four shall be persons interested or knowledgeable in the problems of mental retardation and other allied fields. * * *"

and Section 5126.02, Revised Code, states:

> "Each county board of mental retardation shall organize itself annually no later than the fifteenth day of January of each year and shall elect its officers, which shall include

a chairman, vice-chairman, and recording secretary. * * *"

Section 5126.03, Revised Code, states what powers and duties the county board of mental retardation shall have and perform and Section 5126.04, Revised Code, provides that:

> "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."

An examination of the above-quoted statutes leaves no room for doubt. The General Assembly, by the enactment of Amended Senate Bill No. 169, required a board of mental retardation in each county. It left no alternative, the failure to amend or repeal Section 5153.06, Revised Code, regarding previously executed agreements, notwithstanding. The seven members of the board are mandated by the General Assembly to organize themselves and elect officers no later than the fifteenth day of January.

Therefore, in answer to your first question, Amended Senate Bill No. 169 requires the creation of, appointment of members to, and the organization of, a county board of mental retardation in Darke County, notwithstanding the fact that the county department of welfare is administering Sections 5127.01 to 5127.04, inclusive, of the Revised Code under an agreement previously entered into with the county child welfare board pursuant to the provisions of Section 5153.06, Revised Code.

Inasmuch as the answer to the third numbered question will have a bearing on the answer to your second numbered question, I will now consider the status of the agreement as it is affected by Amended Senate Bill No. 169. As I observed in Opinion No. 67-088, Opinions of the Attorney General for 1967, the administration and supervision of Sections 5127.01 to 5127.04, inclusive, of the Revised Code was vested in the county child welfare board by the enactment of Section 5153.161 [5153.16.1], Revised Code, in 1961 (129 v 1614), which supplemented the powers and duties vested in the county child welfare boards by Section 5153.16, Revised Code. Possessing the supplementary powers and duties relative to Sections 5127.01 to 5127.04, inclusive, supra, the county child welfare board was in a position to enter into agreement with the county department of welfare pursuant to Section 5153.06, supra, regarding their exercise and fulfillment. However, by the passage of Amended Senate Bill No. 169, particularly the enactment of Section 5126.03 (A), Revised Code, and the repeal of Section 5153.161 [5153.16.1], supra, the county child welfare board's powers and duties relative to Sections 5127.01 to 5127.04, inclusive, supra, and hence any agreements pertaining thereto, were terminated. As of October 25, 1967, the subject matter of the agreement as well as the authority to make the agreement became vested in the county board of mental retardation. This agreement so far as it relates to the transfer of powers and duties under Section 5153.16, supra, remains unimpaired.

Therefore, in answer to your third numbered question, an agreement entered into by the county child welfare board and

the county department of welfare pursuant to authority granted in Section 5153.06, Revised Code, so far as it relates to the transfer of the child welfare board's powers and duties regarding the administration and supervision of Sections 5127.01 to 5127.04, inclusive, Revised Code, is terminated upon the effective date of the repeal of the statute, Section 5153.161 /5153.16.1/, Revised Code, under which the transferred powers and duties were vested in the county child welfare board.

In considering your second numbered question, relative to the tax levy, by subsequent correspondence you furnished a copy of the resolution of necessity which reads in pertinent part:

> "Resolved, by the Board of County Commissioners of Darke County, Ohio, two-thirds or more of the members elected thereto concurring, that it is necessary to levy a tax in excess of the ten-mill limitation to supplement such general fund appropriations for the purpose of providing an adequate amount for the support of child welfare services, to wit: for the maintenance and operation of schools, training centers or workshops for mentally retarded persons, for a period of five (5) years on the taxable property in said Darke County, Ohio; and be it further
>
> "* * * * * * * * *
>
> "Resolved, that this resolution is hereby adopted under the provisions of Section 5705.19 of the Revised Code of Ohio and that this is a renewal of an existing levy of 2/10 of a mill."

The resolution further states that the proposed renewal was to be presented to the electorate at the general election held on November 2, 1965.

Section 5705.19, Revised Code, as amended in Amended Senate Bill 169, reads in pertinent part:

> "The taxing authority of any subdivision at any time prior to the fifteenth day of September, in any year, by vote of two-thirds of all the members of said body, may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the subdivision, and that it is necessary to levy a tax in excess of such limitation for any of the following purposes:
>
> "* * * * * * * * *
>
> "(L) For the maintenance and operation of schools, training centers, workshops, clinics, and residential facilities for mentally retarded persons. <u>Money received from levies enacted or renewed prior to the effective date of this section shall be appropriated to the use of the county board of mental retardation established</u>

under section 5126.01 of the Revised Code. Revenue from a tax levy passed or renewed after October 25, 1965 shall not be expended until the budget for the operation of schools, training centers, workshops, clinics, and residential facilities for mentally retarded persons for that calendar year has been submitted to and approved by the board of county commissioners. Thereafter, surplus funds from the tax levy not used for operating purposes may be dispensed by the * * * county board of mental retardation after approval by the board of county commissioners for the replacement of necessary equipment, or for acquiring, constructing, or improving schools, training centers, workshops, clinics, and residential facilities for the mentally retarded." (Underscoring indicates amendments)

Giving effect to the language of the amendment to subsection (L) of Section 5705.19, Revised Code, and my conclusion that the agreement between the county child welfare board and the county department so far as it relates to the transfer of powers and duties formerly vested in the child welfare board pursuant to now repealed Section 5153.161 /5153.16.1/, supra, is terminated, monies received from a tax levied pursuant to Section 5705.19 (L), Revised Code, for the maintenance and operation of schools, training centers or workshops for mentally retarded persons must be appropriated to the use of the Darke County Board of Mental Retardation.

## OPINION NO. 68-020

**Syllabus:**

Even though sentenced to be imprisoned for life a convict may be removed from a penal institution to attend a hearing on his petition for vacation of sentence under the so-called post conviction remedy procedures provided for in Sections 2953.21, et seq., Ohio Revised Code. The restriction in Section 2941.40 of the Revised Code is not applicable to the forementioned proceedings.

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**To: David D. Dowd, Jr., Stark County Pros. Atty., Canton, Ohio**
**By: William B. Saxbe, Attorney General, January 24, 1968**

Your letter to E. L. Maxwell, Warden of the Ohio Penitentiary, regarding removal of a convict from the penitentiary for an evidentiary hearing on his petition to vacate his judgment of sentence has been referred to me for reply.

You point out that in State v. Lawson, 12 Ohio St. 2d 9 the Court held:

"Although Section 2953.22, Revised Code, as

now in effect, provides that it is not necessary that the prisoner be present at the hearing, a hearing certainly contemplates that each party have an opportunity to introduce evidence.

"In the instant case, the record does not show that appellant was present, was given an opportunity to present witnesses or to testify, was represented by counsel or was given an opportunity to cross-examine the state's witness. This does not conform to the requirements of an evidentiary hearing as ordered by the Court of Appeals.

"The motion to certify is allowed, the judgment of the Court of Appeals is reversed and the cause is remanded to the Court of Common Pleas for a proper evidentiary hearing."

You then inquire whether the restriction in Section 2941.40 of the Revised Code, concerning convicts serving life sentences, applies to so-called post conviction remedy proceedings.

Section 2941.40, Ohio Revised Code, provides:

"A convict in the penitentiary or a state reformatory, who escaped, or forfeited his recognizance before receiving sentence for a felony, or against whom an indictment or information for felony is pending, may be removed to the county in which such conviction was had or such indictment or information was pending, for sentence or trial, upon the warrant of the court of common pleas of such county.

"This section does not extend to the removal of a convict sentenced to be imprisoned for life, unless the sentence to be imposed or the indictment or information pending against him is for murder in the first degree."

Early drafts of House Bill No. 742, which became the new Sections 2953.21, et seq., of the Revised Code, provided in pertinent part:

"Sec. 2953.22. If a hearing is granted pursuant to section 2953.21 of The Revised Code, the petitioner shall be permitted to attend such hearing unless he is a convict sentenced to be imprisoned for life or sentenced to be executed. Testimony of the prisoner or other witnesses may be offered by deposition."

During processing of the bill in the legislature various discussions were had regarding the foregoing provision and the conclusion was reached that it was unacceptable. This portion of the bill was, therefore, amended and passed in the following form:

"Sec. 2953.22. If a hearing is granted pur-

suant to section 2953.21 of the Revised Code, the petitioner shall be permitted to attend such hearing. Testimony of the prisoner or other witnesses may be offered by deposition."

We thus have a clear reflection of a legislative intent that the restriction in Section 2941.40, Ohio Revised Code, should not apply to proceedings under Sections 2953.21, et seq., Ohio Revised Code.

It is, therefore, my opinion and you are hereby advised that even though sentenced to be imprisoned for life a convict may be removed from a penal institution to attend a hearing on his petition for vacation of sentence under the so-called post conviction remedy procedures provided for in Sections 2953.21, et seq., Ohio Revised Code. The restriction in Section 2941.40 of the Revised Code is not applicable to the forementioned proceedings.

## OPINION NO. 68-021

**Syllabus:**

1. Townships are entitled to distribution under Section 4513.35, Revised Code, when apprehensions or arrests are made by sheriff's deputies performing police duties under a contract with the township in accordance with Section 311.29, Revised Code.

2. Section 4513.35, Revised Code, requires the county treasurer to pay fifty percent of the fines and forfeitures discussed therein to the township whose "police officers" made the arrests or apprehensions and the remaining fifty percent is distributed one-half of fifty percent to the highway maintenance and repair fund and one-half of fifty percent to the county law library association with the twelve hundred dollar maximum limitation.

3. A township receiving moneys under Section 4513.35, Revised Code, is not required to make any payment from these moneys to the county law library association.

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**To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio**
**By: William B. Saxbe, Attorney General, January 25, 1968**

I have before me your letter of October 19, 1967, wherein you request my opinion on the following questions:

"1. Under the provisions of Section 4513.35, Ohio Revised Code, as amended in May 1967, are townships entitled to distribution thereunder when apprehensions or arrests are made by sheriff's deputies performing police duties under a contract with the township for police protection, in accordance with Section 311.29, Ohio Revised Code?

"2. Does Section 4513.35, Ohio Revised Code,

as amended in May 1967, require the county treasurer to pay fifty percent of the fines and forfeitures discussed therein to the county law library association, and fifty percent of those fines and forfeitures to the township whose police officers made the apprehensions or arrests or is the county treasurer required to place one-half of fifty percent in the highway maintenance and repair fund and give one-half of fifty percent to the law library association, and give the remaining fifty percent to the appropriate township?

"3. Is a township receiving distribution under Section 4513.35 required to make any payment from these monies to the county law library association?"

Section 4513.35, Revised Code, provides as follows:

"All fines collected under sections 4511.01 to 4511.78, inclusive, 4511.99, and 4513.01 to 4513.37, inclusive, of the Revised Code shall be paid into the county treasury and, with the exception of that portion distributed under section 3375.53 of the Revised Code, shall be placed to the credit of the fund for the maintenance and repair of the highways within such county, provided that all fines collected from, or moneys arising from bonds forfeited by, persons apprehended or arrested by state highway patrolmen shall be distributed as provided in section 5503.04 of the Revised Code and provided that one-half of all fines collected from, and one-half of all moneys arising from bonds forfeited by, persons apprehended or arrested by a township constable or other township police officer shall be paid to the township treasury to be placed to the credit of the general fund." (Emphasis added)

The underlined portion of the above quoted statute indicates the recent amendment to that section; and, it further indicates a legislative intent to provide a source of revenue, for the township general fund. In order for this amended provision to apply, the arrest or apprehension must be made by a "township constable or other township police officer".

Where the sheriff and a township enter into a contract to provide additional police protection, the question arises whether a sheriff's deputies are considered "other township police officers" as that term is used in Section 4513.35, supra.

A contract, such as described above, is made pursuant to Section 311.29, Revised Code, which provides, in part, as follows:

"The sheriff may enter into contracts with any township whereby the sheriff undertakes and is authorized to perform any police function, exercise any police power, or render any police service in behalf of the [township] * * * which such [township] * * * may perform,

exercise, or render * * * the sheriff may exercise the same powers as the [township] possesses * * * as amply as such powers are possessed by the [township] * * *.

" * * * The number of deputies regularly assigned to such policing shall be in addition to and an enlargement of the sheriff's regular number of deputies."

The language of the foregoing section is inescapably clear. The sheriff, under such an agreement, hires additional deputies to perform "in behalf of" the township any policing which the township may perform. This language clearly places the assigned deputy in the same position as if he were a township police officer with the same power and duties thereof.

It is in this light that the additional deputies must be viewed for purposes of Section 4513.35, supra. To hold otherwise would create undue hardship for an ill-equipped township which later contracts for additional police protection in order to better meet its responsibilities. It is my opinion that sheriff's deputies, performing pursuant to such contracts, are to be considered as "other township police officer" under Section 4513.35, supra.

The amended provision required one half of all the moneys arising from fines and bond forfeitures to be paid into the township general fund where the arrest or apprehension is made by a "township police officer." Thus in following the court's reasoning in State ex rel. Bd. of Trustees v. Vogel, 169 Ohio St. 243, 159 NE 2d 220, 8 Ohio Opinions, 2d 249, these moneys must be treated separately. That is, one-half of all the moneys must be paid into the township treasury, first. Your question requires consideration of the remaining one-half and the application of Section 3375.53, Revised Code, which reads as follows:

"In each county, fifty per cent of all moneys arising from fines and penalties and from forfeited deposits and forfeited bail bonds and recognizances taken for appearances on account of offenses brought for prosecution in any court in such county under Chapters 4301. and 4303. of the Revised Code and the state traffic laws shall be paid monthly by the treasurer of the county or municipal corporation to the board of trustees of the law library association in such county, but the sum so paid to such board by each treasurer shall not exceed twelve hundred dollars per annum under Chapters 4301. and 4303. of the Revised Code, and when that amount has been so paid to such board in accordance with this section, then no further payments shall be required thereunder in that calendar year from such treasurers."

Prior to the present amendment, one-half of all the moneys collected was placed in the highway maintenance and repair fund and one-half was paid to the law library association pursuant to the above quoted statutory provision. It was clearly not the

legislative intent to disturb this part of the statute but rather to provide that before the application a payment of one-half the moneys should be paid to the township treasury. The remaining fifty percent is distributed in accordance with the general provision with one-half of the fifty percent going to the highway maintenance and repair fund and one-half of the fifty percent going to the law library association with the twelve hundred dollar maximum limitation.

There is nothing in Section 4513.35, supra, or in Section 3375.53, supra, imposing any duty upon the township to pay moneys to the law library association. Section 3375. 53, supra, requires payments to be made by the treasurer of the county or municipal corporation but no such requirements devolve upon a township.

Therefore, it is my opinion and you are advised as follows:

1. Townships are entitled to distribution under Section 4513.35, Revised Code, when apprehensions or arrests are made by sheriff's deputies performing police duties under a contract with the township in accordance with Section 311.29, Revised Code.

2. Section 4513.35, Revised Code, requires the county treasurer to pay fifty percent of the fines and forfeitures discussed therein to the township whose "police officers" made the arrests or apprehensions and the remaining fifty percent is distributed one-half of fifty percent to the highway maintenance and repair fund and one-half of fifty percent to the county law library association with the twelve hundred dollar maximum limitation.

3. A township receiving moneys under Section 4513.35, Revised Code, is not required to make any payment from these moneys to the county law library association.

## OPINION NO. 68-022

**Syllabus:**

A tear gas gun or other device which would spray a chemical and upon contact render a person helpless or temporarily incapacitated, but would not cause great bodily harm, and the effects of which last for only a short period of time is not a dangerous weapon as defined in Section 2923.01 of the Revised Code.

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**To: Donald D. Simmons, Wood County Pros. Atty., Bowling Green, Ohio**
**By: William B. Saxbe, Attorney General, January 25, 1968**

You have requested my opinion as to whether a tear gas gun, or other device which would spray a chemical and upon contact render a person helpless or temporarily incapacitated would be a "dangerous weapon" and subject to the prohibition of Section 2923.01 of the Revised Code, which provides in pertinent part:

"No person shall carry a pistol, bowie

knife, dirk, or other dangerous weapon concealed on or about his person.* * *"

The definition which appears to have been accepted for some years is that a dangerous weapon is one likely to produce death or great bodily harm. As the court stated in United States v. Williams, 2 Fed. 61, 65:

> "Whether a particular weapon is a deadly or dangerous one is generally a question of law. Sometimes owing to the equivocal character ofthe instrument - as a belaying pin - or the manner and circumstances of its use, the question becomes one of law and fact, to be determined by the jury under the direction of the court. But where it is practicable for the court to declare a particular weapon dangerous or not, it is its duty to do so. A dangerous weapon is one likely to produce death or great bodily injury.* * *"

See also United States v. Reeves, 38 Fed. 404,407 and State v. Cavender, 243 PAC (Or) 766.

In Price v. United States, 156 Fed. 950, 952 (CA9) it was stated:

> "A dangerous weapon is one likely to produce death or great bodily injury. United States v. Williams (CC) 2 Fed. 64. Or perhaps it is more accurately described as a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm."

I am advised that the chemicals used in the devices under consideration are non-lethal and normally do not inflict a great bodily harm.

It is, therefore, my opinion and you are hereby advised that a tear gas gun or other device which would spray a chemical and upon contact render a person helpless or temporarily incapacitated, but would not cause great bodily harm, and the effects of which last for only a short period of time is not a dangerous weapon as defined in Section 2923.01 of the Revised Code.

## OPINION NO. 68-025

**Syllabus:**

1. The clerk of courts of each county must collect the sales tax on all sales of motor vehicles made by trustees in bankruptcy pursuant to Section 4505.06, Revised Code.

2. The clerk of courts shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the sales tax is paid in the manner prescribed in Section 4505.06, Revised Code, or not required under paragraphs (A) through (E) of Section 4505.06, Revised Code.

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**To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio**
**By: William B. Saxbe, Attorney General, January 30, 1968**

Your request for my opinion reads as follows:

> "1. Should the Clerk of Courts of each county collect sales or use tax on all sales of motor vehicles by trustees in bankruptcy?
>
> "2. If the answer to No. 1 is in the affirmative, may the Clerk of Courts properly refuse to transfer title to a purchaser of an automobile from a trustee in bankruptcy unless the sales or use tax is paid?"

Section 5739.01, Revised Code, provides in pertinent part:

> "As used in sections 5739.01 to 5739.31, inclusive, of the Revised Code:
>
> "(A) 'Person' includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.
>
> "(B) 'Sale' and 'selling' include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred * * * for a consideration * * *
>
> "(C) 'Vendor' means the person by whom the transfer effected or license given by a sale is or is to be made or given; * * *

"(D) 'Consumer' means the person to whom the transfer effected or license given by a sale is or is to be made or given, or to whom the admission is granted.

"* * * * * * * * *

"(E) 'Retail sale' and 'sales at retail' include all sales except those in which the purpose of the consumer is: (none of which are herein relevant)

"* * * * * * * * *

"(G) 'Engaging in business' means com mencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds himself out to the public as conducting such business. Making a casual sale is not engaging in business.

"* * * * * * * * *

"(M) 'Casual sale' means a sale of an item of tangible personal property which was obtained by the person making the sale, through purchase or otherwise, for his own use in this state."

(Parenthetical matter added)

Section 5739.02, Revised Code, provides in pertinent part:

"For the purpose of providing revenue with which to meet the needs of the state * * * an excise tax is hereby levied on each retail sale made in this state.

"* * * * * * * * *

"(B) The tax does not apply to the following:

"* * * * * * * * *

"(8) Casual sales by a person not engaged in the business of selling tangible personal property except as to such sales of motor vehicles and house trailers;

"* * * * * * * * *

"For the purpose of the proper administration of sections 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established."

Giving effect to the above-quoted provisions of Sections

5739.01 and 5739.02, both supra, all sales of motor vehicles by trustees in bankruptcy are subject to the four percent state sales tax regardless of whether the said sales are made by the trustee while "engaging in business" or as "casual sales."

However, as a result of the decision of the referee in bankruptcy in the case of In re Payne Corporation, Bankrupt, United states District Court, Northern District, Eastern Division, decided November 13, 1953, and reported in 68 Ohio Law Abs. 545, 53 Ohio Opinions 467, there is some question as to the enforceability of the collection of the tax when the sale is a "casual sale" as defined in paragraph (M) of Section 5739.01, supra. There is no question about the taxability of sales of motor vehicles by trustees in bankruptcy in the conduct of the bankrupt's business. 28 U.S.C.A., Section 960, reads as follows:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

In the Payne Corporation case, the referee held:

> "For the reasons stated I conclude:
>
> "1. That by reason of omission of a trustee in (liquidating) bankruptcy in the definition of 'persons' in the Ohio Sales Act, this act does not apply to sales by the trustee pursuant to the order of the Bankruptcy Court for the purpose of liquidation as distinguished from sales in the conduct of bankrupt's business.
>
> "2. If, contrary to the above conclusion, it should be found that such sales are within the provision of the Sales Tax statute, I conclude that such statute, in this respect, is invalid for the reason that it interferes with the administration of the Bankruptcy Act by the Bankruptcy Court and is contrary to the purpose of Congress, as evidenced by 28 U.S.C.A. Sec. 960, to restrict the validity of states taxes, payable by trustee for their actions during the administration, to sales made by the trustee while conducting the bankrupt's business." (68 Ohio Law Abs. at 558)

In regard to the referee's first basis for concluding that liquidating sales of motor vehicles by trustees in bankruptcy were not taxable, it must be noted that the Ohio General Assembly amended paragraph (A) of Section 5739.01, supra, in Amended Substitute Senate Bill No. 376 (128 Ohio Laws 421, 423), effective July 1, 1959, so as to expressly

include trustees in bankruptcy within the definition of "person."

In regard to the referee's second basis for holding that liquidating sales of motor vehicles by trustees in bankruptcy were not taxable, the referee observed:

> "* * * In fact, it is evident that the Commissioner looks chiefly to the vendor in the payment of the tax.
>
> "A considerable number of sections rather clearly disclose that the vendor is liable, certainly as much liable as the consumer The vendor is not secondarily liable, if by that is meant that the consumer must first be looked to for payment. The vendor is liable whether he collects the tax or not. In fact, the vendor is liable in some instances where the consumer is not."
> (Emphasis by the court)
> (68 Ohio Law Abs. at 556)

and further observed that the decisions cited therein held that no state could levy a tax upon the process of the Courts of the United States or impede the officers of the Courts in an essential judicial function, and concluded that the State could not enforce the tax upon the casual sale of a motor vehicle by a trustee in bankruptcy pursuant to Court order either directly or indirectly through the clerk of courts. However, in regard to the sales tax upon casual sales of motor vehicles by trustees in bankruptcy, it is my opinion that the decision of the Payne Corporation is no longer applicable in Ohio.

The tax levied under Section 5739.02, supra - which is not to be confused with the four percent excise tax upon the privilege of engaging in the business of making retail sales levied by Section 5739.10 Revised Code - is upon the consumer, and the vendor's liability, if any, is that of a collector and d trustee. See Section 5739.03, Revised Code amended by Amended Substitute Senate Bill No. 35C (132 v. S 350), effective December 1,1967, which reads in part as follows:

> "Except as provided in section 5739.05 of the Revised Code, the tax imposed by or pursuant to section 5739.02 or 5739.021 of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, in the manner and at the times provided as follows:"

It has been recognized by the federal courts that sales taxes levied upon sales by trustees while liquidating the

bankrupt's estate are proper and valid if the tax is upon the purchaser or consumer. See In re Leavy et al. City of New York v. Jersawit, CCA 2d, 1936, 31 Am. Bankruptcy Reports (N.S.) 698, 85 F. 2d 25. At this point, it should be noted that one of the decisions relied on in the Payne Corporation case which the referee stated "comes closer to the realities" (68 Ohio Law Abs., at 553) is the case of In re West Coast Cabinet Works, Inc., 92 F. Supp. 636, aff'd. in California State Board of Equalization v. Goggin, 191 F. 2d 726. In this case, however, the district court distinguished the In re Leavy case, supra, on the ground that the tax in Leavy was upon the consumer and the California sales tax was upon the seller, a tax upon the privilege of making retail sales (92 F. Supp., at 646 and 649). Obviously, a sales tax upon a trustee in bankruptcy on the privilege of selling the bankrupt's property pursuant to a court order would constitute a tax upon the process of the Federal courts. But, as is shown unequivocally by the quoted portion of Section 5739.03, supra, the Ohio sales tax levied in Section 5739.02, supra, is upon the purchaser and in no way taxes the process of the Federal courts.

In addition to the fact that the trustee in bankruptcy is not subject to the burden of the tax, under section 4505.06, Revised Code, a trustee in bankruptcy making a casual sale of a motor vehicle is not even liable or responsible for the collection of the sales tax under the provisions of the statute which provide in pertinent part:

> "In the case of the sale of a motor vehicle by a dealer to a general purchaser or user, the certificate of title shall be obtained in the name of the purchaser by the dealer upon application signed by the purchaser. In all other cases such certificates shall be obtained by the purchaser. In all cases of transfer of motor vehicles the application for certificate of title shall be filed within seven days after the delivery of such motor vehicle.
>
> "The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the dealer or the applicant, in cases in which the certificate shall be obtained by the purchaser, submits with the application, payment of the tax levied by or pursuant to section 5739.02 or 5739.021 /5739.02.1/ of the Revised Code by cash, certified check, draft, or money order payable to the clerk who shall issue a receipt in the form prescribed by the tax commissioner, or a receipt issued by the commissioner showing the payment of the tax."
>
> (Emphasis added)

As can be seen from the emphasized language, the tax levied by Section 5739.02, supra, is to be collected by the clerk

of courts directly from the purchaser at the time the purchaser makes application for his certificate of title. In other words, the trustee in bankruptcy who makes a casual sale of a motor vehicle pursuant to an order of liquidation by the bankruptcy court is liable for neither the payment of the sales tax nor the collection of the sales tax. Therefore, for these reasons, the decision of the referee in bankruptcy in the case of In re Payne Corporation, Bankrupt, supra, is no longer applicable and, in answer to your first question, the clerk of courts of each county must collect the sales tax on all sales of motor vehicles made by trustees in bankruptcy pursuant to Section 4505.06, supra.

In answer to your second question relative to the refusal to accept an application for a certificate of title and to issue a certificate of title, Section 4505.06, supra provides in pertinent part:

> "The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the dealer or the applicant, in cases in which the certificate shall be obtained by the purchaser, submits with the application, payment of the tax levied by or pursuant to section 5739.02 or 5739.021 /5739.02.1/ of the Revised Code by cash, certified check, draft, or money order payable to the clerk who shall issue a receipt in the form prescribed by the tax commissioner, or a receipt issued by the commissioner showing the payment of the tax.
>
> "* * * * * * * * *
>
> "In the following cases the clerk shall accept for filing such application and shall issue certificate of title without requiring payment or evidence of payment of either tax:
>
> "(A) When the purchaser is this state or any of its political subdivisions, a church, or an organization whose purchases are exempted by section 5739.02 of the Revised Code;
>
> "(B) When the transaction in this state is not a retail sale as defined by section 5739.01 of the Revised Code;
>
> "(C) When the purchase is outside this state or in interstate commerce and the purpose of the purchaser is not to use, store, or consume within the meaning of section 5741.01 of the Revised Code;
>
> "(D) When the purchaser is the federal government;
>
> "(E) When the motor vehicle was purchased outside this state for use outside this state."

Since I have concluded that the imposition of the sales tax levied by Section 5739.02, supra, is upon the consumer or purchaser and the trustee in bankruptcy either must collect it and remit it to the clerk if he is engaged in the business of making retail sales in light of 28 U.S.C.A., Section 960, or is not obligated to collect it if the sale is a casual sale, the sales tax levied upon sales of motor vehicles when made by trustees in bankruptcy in the course of business is permissible under the above quoted federal statute, and the sales tax levied upon casual sales of motor vehicles by trustees in bankruptcy does not constitute taxes upon the process of the Courts of the United States and does not impede the judicial functions of the officers of said courts and the clerk of courts shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the sales tax is paid in the manner prescribed in Section 4505.06, Revised Code, or not required under paragraphs (A) through (E) of Section 4505.06, Revised Code.

## OPINION NO. 68-029

**Syllabus:**

1. It is not mandatory or necessary for members of the Automatic Data Processing Board to elect a President or Chairman.

2. A separate appropriation account may be established for the Automatic Data Processing Board which could be credited for services rendered other offices and departments while at the same time the appropriation accounts of such offices and departments serviced by the Data Processing Center would be debited.

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**To: Roger Cloud, Auditor of State, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, February 6, 1968**

I have before me your request for my opinion of December 6, 1967, as amended by your supplemental request of January 15, 1968, wherein you pose the following questions:

> "(1) Is it mandatory, or necessary, for members of the Automatic Data Processing Board to elect a President or Chairman, or does the Auditor, as Secretary and Chief Administrative Officer of the Board, fulfill this responsibility?
>
> "(2) May a separate appropriation account be established for the Automatic Data Processing Board, which could be credited on a cost basis for services rendered other of-

fices and departments at their request while, at the same time, debiting the appropriation accounts of such offices and departments serviced by the Data Processing Center?"

The 107th General Assembly of the State of Ohio enacted Amended Substitute Senate Bill No. 269, the purpose of which was to enact Sections 307.84 to 307.846, inclusive, of the Revised Code, relative to the establishment and operation of a County Data Processing Board. The Bill became effective September 20, 1967.

Section 307.844, Revised Code, provides:

> "The county auditor shall be the chief administrator of the county automatic data processing board and may employ a deputy who shall serve under his direction. The auditor or his deputy shall supervise the operation of the automatic data processing center. Subject to approval by the board, the administrator shall employ such other persons as are necessary for the operation of the center and shall fix the compensation of the deputy and all such employees. Salaries and expenses of the center shall be paid from funds budgeted and appropriated to the board by the board of county commissioners. The administrator may adopt such rules and regulations as are necessary for the operation of the center."

The initial provisions of Section 307.844, supra, answer your first question. It is clear that the County Auditor is the Chief Administrator of the County Automatic Data Processing Board, that he or his deputy shall supervise the operations of the Center, that he shall initially employ those necessary for the operation of the Center and shall fix their compensation and may adopt rules and regulations necessary for the operation of the Center. This authority is that usually reposed in a president or chairman of a board and I cannot conceive what additional authority would be given to a president or chairman who was not the county auditor.

Section 307.846, Revised Code, provides:

> "The county automatic data processing board may enter into a contract with the legislative authorities of any municipal corporation, township, port authority, water or sewer district, school district, library district, health district, park district, soil and water conservation district, conservancy district, or other taxing district, or with the board of county commissioners

> or the automatic data processing board of any other county, and such authorities may enter into contracts with the county automatic data processing board, to provide automatic data processing services to any of them. The board shall establish a schedule of charges upon which the cost of providing such services shall be based. All moneys collected by the board for services rendered pursuant to contracts entered into under this section shall be deposited in the county general fund; however, such moneys may be segregated into a special fund in the county treasury until the end of the calendar year. County offices may also be charged for such services and the appropriation so charged and the appropriation of the board so credited."

The County Automatic Data Processing Board may be credited for the charges for service with any agency of government with which it has a contract pursuant to Section 307.846, supra, and the account of the governmental agency receiving the service would be debited in like amount.

Accordingly, it is my opinion and you are hereby advised as follows:

1. It is not mandatory or necessary for members of the Automatic Data Processing Board to elect a President or Chairman.

2. A separate appropriation account may be established for the Automatic Data Processing Board which could be credited for services rendered other offices and departments while at the same time the appropriation accounts of such offices and departments serviced by the Data Processing Center would be debited.

## OPINION NO. 68-031

**Syllabus:**

The positions of teacher in a municipal school district and member of the board of trustees of a community college created by and operating under Chapter 3354, Revised Code, are compatible, and the positions may be held by the same person at the same time, provided it is physically possible to discharge the duties of both positions.

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**To: Paul J. Mikus, Lorain County Pros. Atty., Elyria, Ohio**
**By: William B. Saxbe, Attorney General, February 7, 1968**

I have before me your request for my opinion on the question of whether the positions of teacher in a municipal school district and member of the board of trustees of a community college district are compatible.

A reading of Section 3319.07 et seq., Revised Code, relating to the employment of teachers, and of Chapter 3354, Revised Code, relating to the establishment and operation of community colleges, reveals no specific statutory prohibition against the arrangement described in your letter. In the absence of such a prohibition, the compatability of the two positions in question must be tested under the common law doctrine of compatability, which is stated in State ex rel. Attorney General v. Gebert, 12 C.C. (N.S.) 274, 275, as follows:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

I have expressed the view in Opinion No. 1305, Opinions of the Attorney General for 1964, on the basis of the aforementioned test, that the positions of county treasurer and treasurer of a community college district are incompatible. After noting that the county treasurer is a member of the county budget commission by virtue of Section 5705.27, Revised Code, and that the budget of the community college district must be submitted to the county budget commissioners, pursuant to Section 5705.28, Revised Code, to determine the validity of certain tax levies imposed by the community college district, I concluded that, at least to a limited extent, the county budget commission performs a check upon and is superior to the board of trustees of a community college district and its treasurer, and that this results in the incompatability of the offices which were the subject of that opinion.

However, in considering the statutes which determine the compatability of the positions which are the subject of the present opinion, I can find no situation in which either position could be construed to be subordinate to, or a check upon, the other. Of course, whether it is physically possible to perform the duties of both positions at the same time is a question of fact to be determined in each individual case.

Therefore, it is my opinion and you are hereby advised that the positions of teacher in a municipal school district and member of the board of trustees of a community college created by and operating under Chapter 3354, Revised Code, are compatible, and the positions may be held by the same person at the same time, provided it is physically possible to discharge the duties of both positions.

# OPINION NO. 68-032

**Syllabus:**

1. If the charge or any portions thereof for the care and treatment of patients admitted to the two state tuberculosis hospitals is borne through Medicare, such charge should not be certified to the Auditor of State as being due from the patients' county of residence.

2. In those cases where duplicate payments have been received for the cost of care and treatment of patients admitted to the two state tuberculosis hospitals, reimbursement may be made to the appropriate counties under the provisions of Section 131.06, Revised Code.

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**To: Roger Cloud, Auditor of State, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, February 13, 1968**

Before me is your recent request for my opinion which raised several questions resulting from the state receiving duplicate payments for the care and treatment of certain patients at the two state tuberculosis hospitals.

Sections 3701.64 and 3701.83, Revised Code, provide that the cost for the care and treatment of patients in said hospitals is to be borne by the county of which the patient is a resident. With the advent of Medicare, billings have continued to the counties though the cost of care and treatment of certain patients has been borne by Medicare.

The resulting duplicate payment has raised the following questions.

> 1. Should there be certified to the Auditor of State for collection from a county, charges for the care and treatment of patients at the two state tuberculosis hospitals if such costs are borne through Medicare?
>
> 2. May reimbursement be made to the counties in those cases where duplicate payments have been received for the care and treatment of patients at said hospitals?

It has been brought to my attention that the designated fiscal intermediary between the two state tuberculosis hospitals and the Federal Government, Blue Cross, bases payment to the hospitals on the actual cost for the care and treatment of a patient, such payment currently being in excess of thirty dollars per patient per day. After receiving from the hospitals the bills for the care of the patients, Blue Cross submits them to the Federal Government for payment by Medicare and then pays the Department of Health, through the hospitals, the money

received. Except for several credits made to counties by the Southeastern Tuberculosis Hospital, all money received through Medicare payments has been placed by the Department of Health in a depository trust pending a determination for the proper disposition thereof.

Sections 3701.64 and 3701.83, Revised Code, set forth the procedure by which a county is charged for the care and treatment of its residents who are patients in the two hospitals in question.

Section 3701.64, Revised Code, provides as follows:

> "The charge for care and treatment of patients admitted to the Ohio tuberculosis hospital shall be borne by the county in which such patient lives. Such charge shall be at the per diem rate determined annually by the director of health, which shall not be more than the average per diem cost of all designated county and district tuberculosis hospitals in the preceding calendar year less the subsidy provided in section 339.43 of the Revised Code. The charge for diagnostic services shall be at a rate determined by the director. Such charge shall be borne by the governmental or private agency requesting such service or by the patient receiving such service. If, after investigation, it is found that any such applicant or patient, or any person legally responsible for his support, requesting such a service, is unable to pay the full charge of the diagnostic service, the director shall determine the amount such applicant, patient, or person shall pay. The director shall certify to the auditor of state the amounts due from each county for the care and treatment of patients hospitalized under sections 3701.60 to 3701.64, inclusive of the Revised Code. The auditor of state shall transmit to the board of county commissioners of each such county a statement of the amount due for such care and treatment.
>
> "All moneys received by the state for such care and treatment at such hospital shall be paid into the state treasury."

Section 3701.83, Revised Code, contains essentially the same provisions as Section 3701.64, supra, except that it pertains to Southeast Ohio Tuberculosis Hospital.

Payments received from a county are then deposited in the General Reserve Fund.

It should be noted that Sections 3701.64 and 3701.83, supra, both provide that the Director of Health must certify to the Auditor of State the amounts due from each county for the care and treatment of patients hospitalized pursuant thereto.

It is my opinion that a county should not be responsible

for expenses for which remuneration has been made under the provisions of the Medicare Act, or for that portion of a bill which has been so paid. Having been paid, such amount is no longer due, and the Director of Health should not certify it to the Auditor for collection. Future sums paid under the Medicare Act should be credited to the appropriate county so the amount due from such county is no more than the cost of care and treatment which is not covered by Medicare.

A similar conclusion was reached in Opinion No. 1397, Opinions of the Attorney General for 1952, where a question there considered was a county charging a patient the full amount for care and treatment at the Ohio Tuberculosis Hospital without taking into consideration a credit received by the county. At page 328, one of my predecessors stated in part as follows:

> "* * * * * * * * *
>
> "* * * The law certainly does not authorize, and in my opinion does not contemplate that the county commissioners should make a profit from a patient by exacting from him the full amount for which the State Hospital has billed him, without giving him the benefit of the credit of $1.25 per day which they have received from the State. * * *
>
> "* * * * * * * * *"

The situation presented by the continued billing to a county without giving that county benefit of payments received through Medicare is analogous.

The next question for consideration is the procedure to be followed in making restitution to the counties in those cases where duplicate payment has been made.

When the Medicare Act became effective and the tuberculosis hospitals began to receive money thereunder, the Director of Health, realizing the problems resulting from duplicate payments, deposited that money in the depository trust fund pursuant to Section 131.05, Revised Code. Reimbursement to a county for payments made by such county, but not in fact due because of the cost of care and treatment being borne through Medicare, may be accomplished under the provisions of Section 131.06, Revised Code, which sets forth the procedure for the withdrawal of money from the depository trust fund, and provides in pertinent part as follows:

> "* * * Withdrawals of money from such fund shall be made by requisition on the treasurer of state as custodian of the fund by the authorized official of the office or department wherein the receipt originated. Such requisition shall show the purpose of the withdrawal and such other information as the treasurer of state requires. * * *"

Accordingly, the Director of Health may request the Treasurer of State to return to the appropriate county that

amount for which duplicate payment was made. Such procedure will achieve equitable results in that the state will not have been unjustly enriched and a county will not have borne more than its statutory share of the cost for the care and treatment of its residents in the two state tuberculosis hospitals.

It should be noted that by the enactment of Amended Substitute Senate Bill No. 397, effective December 13, 1967, the General Assembly repealed Sections 3701.60 through 3701.65, Revised Code, and enacted Sections 3335.42 through 3335.44, Revised Code, authorizing the Director of Health to transfer the Ohio Tuberculosis Hospital to the board of trustees of the Ohio State University. By his order of December 13, 1967, the Director of Health did transfer all facilities, equipment, and supplies of said hospital to the University, and pursuant to the provisions of Section 3335.44, Revised Code, it is now the board of trustees of the University who must certify to the Auditor of State the amounts due from each county for the care and treatment of residents of that county.

The above reasoning in avoiding duplicate payments for the care and treatment of patients as it relates to the Director of Health, similarly applies to the board of trustees of the Ohio State University.

Accordingly, it is my opinion and you are advised as follows:

1. If the charge or any portions thereof for the care and treatment of patients admitted to the two state tuberculosis hospitals is borne through Medicare, such charge should not be certified to the Auditor of State as being due from the patients' county of residence.

2. In those cases where duplicate payments have been received for the cost of care and treatment of patients admitted to the two state tuberculosis hospitals, reimbursement may be made to the appropriate counties under the provisions of Section 131.06, Revised Code.

## OPINION NO. 68-035

**Syllabus:**

A board of education of a City School District may submit a tax levy for current operating expenses under the provisions of Section 5705.21, Revised Code, at a special election, which levy would run for a continuing period of time.

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**To: Thomas W. Kerrigan, Shelby County Pros. Atty., Sidney, Ohio**
**By: William B. Saxbe, Attorney General, February 16, 1968**

Your request for my opinion reads as follows:

"May the Board of Education of a City School District submit a tax levy at a special election

for current operating expenses, which would run for a continuing period of time?"

Section 5705.21, Revised Code, authorizes boards of education to declare by resolution duly adopted that the amount of taxes raised within the ten-mill limitation will be insufficient to provide an adequate amount for the necessary requirements of the school district and to submit the question of an additional levy to the electors of the school district. Prior to the amendments enacted by the 107th General Assembly, the question of the additional levy could only be submitted at one special election during a calendar year and the levy could not be for a longer period than five years.

By Amended House Bill No. 739 (132 v H 739), effective November 7, 1967, the legislature increased the number of special elections that may be called within a calendar year from one to two, but retained the limitation that:

> "* * * Such resolution shall conform to section 5705.19 of the Revised Code, except that such levy may not be for a longer period than five years * * *"

However, Section 5705.21, Revised Code, was again amended in Amended Substitute Senate Bill No. 350 (132 S 350), effective December 1, 1967, and in this amended version the limitation that the levy may not be for a longer period than five years was deleted. That this deletion of the five-year limitation was not the result of an oversight is confirmed by the amendment of the last three sentences of the first paragraph of Section 5705.21, Revised Code, which read as follows:

> "* * * A levy providing current operating revenues for a school district may be reduced pursuant to the provisions of section 5705.261, 5705.31, 5705.331, or 5713.11 of the Revised Code. Such tax levy shall be included in the next annual tax budget that is certified to the county budget commission. After the approval of * * * a levy * * * voted for a specific number of years and prior to the time when the first tax collection from such levy can be made, the board of education of the school district may anticipate a fraction of the proceeds of such levy and issue anticipation notes in an amount not exceeding fifty per cent of the total estimated proceeds of the levy throughout its life." (Underscoring shows new language, * * * show deletion by legislature)

An examination of Sections 5705.261, 5705.31, 5705.331 and 5713.11 of the Revised Code, cited in the above-quoted portion of Section 5705.21, supra, reveals that Section 5705.261 of the Revised Code specifies the manner in which a levy for a continuing period of time may be reduced.

In addition, Section 5705.21, Revised Code, as amended, states that the resolution of necessity shall conform to Section 5705.19, Revised Code, and Section 5705.19, Revised Code, as amended by Amended Substitute Senate Bill 350, supra, provides in pertinent part:

> "Such resolution shall be confined to a single

purpose, and shall specify the amount of increase in rate which it is necessary to levy, the purpose thereof, and the number of years during which such increase shall be in effect, which may or may not include a levy upon the duplicate for the current year. The number of years may be any number not exceeding five, except * * * and except when the additional rate is for the purpose of providing current operating revenues for a school district, * * * the increased rate * * * shall be for a continuing period of time, * * *"
(Emphasis added)

Therefore, giving effect to the foregoing observation, it is my opinion and you are hereby advised that a board of education of a City School District may submit a tax levy for current operating expenses under the provisions of Section 5705.21, Revised Code, at a special election, which levy would run for a continuing period of time.

## OPINION NO. 68-036

**Syllabus:**

1. The Executive Secretary of the Lucas County Child Welfare Board may be appointed legal guardian of a minor when said minor's funds, originally deposited under the provisions of Section 2111.-05, Revised Code, have increased to over One Thousand Dollars.

2. By accepting the responsibilities of such a guardianship, the Executive Secretary of the Lucas County Child Welfare Board is performing the official duties and exercising the powers of his office as set forth in Section 5153.16, Revised Code, and is not entitled to receive guardianship compensation.

3. Section 309.09, Revised Code, requires the Prosecuting Attorney of Lucas County to represent the Executive Secretary of the Lucas County Child Welfare Board except when said Executive Secretary is authorized under Section 305.14, Revised Code, to retain private counsel at county expense.

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**To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio**
**By: William B. Saxbe, Attorney General, February 23, 1968**

You state in your request for my opinion that Section 2111.05, Revised Code, permits the deposit of funds of minors under the care of the Lucas County Child Welfare Board to the Executive Secretary of said Board when these sums are under One Thousand Dollars.

You then request my opinion whether the Executive Secretary may be appointed legal guardian of the minor when the original sum has increased to over One Thousand Dollars, and if he may be so appointed, may he receive guardianship compensation. Furthermore, in the event that the Executive Secretary is appointed, you inquire if the Office of the Prosecuting Attorney of Lucas County is obligated to represent him in the guardianship, or may he engage private counsel.

Section 2111.01 (A), Revised Code, defines a guardian as:

> "* * *any person, association or corporation, appointed by the Probate Court to have the care and management of the person, the estate, or both of a minor, incompetent, habitual drunkard, idiot, imbecile, or lunatic, or of the estate of a confined person.
>
> "* * * * * * * * *"

Section 2111.02, Revised Code, provides in part:

> "When found necessary, the Probate Court on its own motion or by an application by any interested party shall appoint a guardian of the person, the estate, or both of a minor,* * *provided the person for whom the guardian is appointed is a resident of the county or has a legal settlement therein.* * *"

Thus, the General Assembly has given the power to the Probate Court to appoint a guardian when "necessary." Manifestly, this confers upon the Probate Court a wide discretion as to when or under what circumstances it will act to make the appointment. Although as a matter of policy, the Probate Court usually endeavors to appoint one, or someone acceptable to some or all of the next of kin of the minor, it is not required by statute to do so. The best interests of the minor is the controlling consideration in selecting his guardian. In Re Luck, 7 N.P. 49 (1900).

However, the County Welfare Board is a public body established by law and it has only those powers and duties as the General Assembly has seen fit to grant together with such powers as are necessarily implied from the powers specifically granted. Therefore, although the sections of the Revised Code regarding guardianship grants wide discretion to the Probate Court in appointing a guardian, it must be determined whether the General Assembly, in creating County Welfare Boards and defining their powers and duties, authorized the Executive Secretary to accept the appointment and assume the duties of the guardianship.

Section 5153.16, Revised Code, provides in part:

> "The county welfare board shall, subject to the rules, regulations, and standards of the division of social administration, have the following powers and duties on behalf of the children in the county deemed by the board or department to be in need of public care or protective services:
>
> "* * * * * * * * *
>
> "(B) To enter into agreements with the parent, guardian, or other person having legal custody of any child, or with the division, another department, or department of mental hygiene and correction, or any certified organization within or outside the county, or any agency or institution outside the state, having legal custody of any child, with respect to the custody, care, or placement of any such child, or with respect to any

matter, in the interest of such child, provided the permanent custody of a child shall not be transferred by a parent to the board or department without the consent of the juvenile court;

"* * * * * * * * *

"(D) To provide care of all kinds which the board deems for the best interests of any child the board finds in need of public care or service, provided that such care shall be provided by the board by its own means or through other available resources, in such child's own home, in the home of a relative, or in a certified foster home, receiving home, school hospital, convalescent home, or other institution, public or private, within or outside the county or state;

"* * * * * * * * *

"(G) To provide temporary emergency care for any child deemed by the board to be in need of such care, without agreement or commitment;

"* * * * * * * * *

"(L) To co-operate with, make its services available to, and act as the agent of persons, courts, the department of public welfare, and other organizations within and outside the state, in matters relating to the welfare of children;

"* * * * * * * * *"

It is axiomatic that when a statute confers powers and duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. Sutherland, Statutory Construction, Vol. 3, Section 5402 (1943). Furthermore, statutes of a beneficent tendency, grounded upon principles of a humane policy, have consistently been given a liberal construction by Ohio courts. Thomas v. Huesman, 10 Ohio St. 152 (1859); In Re Kraus, 79 Ohio St. 314 (1909); State ex rel Gaddis v. Industrial Com., 133 Ohio St. 553 (1938).

Therefore, the Executive Secretary may be appointed legal guardian in situations where the appointment would serve the minor's best interests and such appointment appears necessary to effectively implement the general powers and duties set out in Section 5153.16, supra.

Furthermore, since the Executive Secretary is permitted by statute to accept the responsibilities of guardianship, no ordinary guardianship compensation should be forthcoming. He is performing in no less than his official capacity and no additional compensation should be required for such services outside the regular salary due such an officer.

You next inquire whether the Prosecuting Attorney of Lucas County has an obligation to render legal service to the Executive Secretary in the event he is appointed legal guardian, or may the Executive Secretary engage private counsel to represent him in the guardianship.

Section 309.09, Revised Code, provides that the prosecuting attorney shall be the legal adviser to all county officers and boards in matters connected with their official duties. My predecessor, in Opinion No. 172, Opinions of the Attorney General for 1959, page 85, interprets this section in the third paragraph of the syllabus as follows:

> "3. Under the provision of Section 309.09, Revised Code, the prosecuting attorney is required to act as legal counsel for the county child welfare board."

However, Section 309.09, supra, further provides that no county officer may employ any other counsel at county expense except as provided in Section 305.14, Revised Code. The latter section provides as follows:

> "If it deems it for the best interest of the county, the court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county board or officer, in any manner of public business coming before such board or officer, and in the prosecuting or defense of any action or proceeding in which such county board or officer is a party or has an interest, in its official capacity."

Therefore, while Section 309.09, Revised Code, requires the prosecuting attorney to represent the Executive Secretary of the County Welfare Board, it is conceivable that situations may occur where, as provided in Section 305.14, supra, the court of common pleas, on application by the prosecuting attorney and the board of county commissioners, determines that the interests of the county would be best served by permitting the Executive Secretary to retain private counsel. The Executive Secretary would be authorized to engage private counsel to represent him in the guardianship at county expense of Lucas County. Therefore, the Prosecuting Attorney is required to represent the Executive Secretary of the Lucas County Child Welfare Board in regard to guardianship activities, except when the Executive Secretary is authorized under the provisions of Section 305.14, supra, to retain private counsel at county expense.

Accordingly, it is my opinion and you are hereby advised:

1. The Executive Secretary of the Lucas County Child Welfare Board may be appointed legal guardian of a minor when said minor's funds, originally deposited under the provisions of Section 2111.-05, Revised Code, have increased to over One Thousand Dollars.

2. By accepting the responsibilities of such a guardianship, the Executive Secretary of the Lucas County Child Welfare Board is performing the official duties and exercising the powers of his office as set forth in Section 5153.16, Revised Code, and is not entitled to receive guardianship compensation.

3. Section 309.09, Revised Code, requires the Prosecuting Attorney of Lucas County to represent the Executive Secretary of the Lucas County Child Welfare Board except when said Executive Secretary is authorized under Section 305.14, Revised Code, to retain private counsel at county expense.

## OPINION NO. 68-037

**Syllabus:**

1. The term "law enforcement agency" as used in Section 4511.191 (A), Revised Code, refers to a police department, division of state highway patrol, sheriff, or board of township trustees.

2. Pursuant to the provisions of Section 4511.191 (A), Revised Code, law enforcement agencies may designate which test or tests are to be administered unless such person has refused to be tested pursuant to the provisions of Section 4511.191 (D), Revised Code.

3. The law enforcement agency designating which test or tests are to be administered is responsible for the expense of such test or tests.

4. The method of contracting with hospitals for chemical tests is within the sound discretion of the agency incurring the legal obligation for payment of the expenses of the tests.

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**To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio**
**By: William B. Saxbe, Attorney General, February 23, 1968**

I am in receipt of your request for my opinion which reads as follows:

> "As you are well aware, Ohio Revised Code Section 4511.191 and 4511.19 become effective January 1, 1968, and the method of implementing and carrying into effect said sections has been raised since ours is a rural county and we do not have a police lab or sheriff's lab that is equipped to conduct the tests under the standards imposed by these sections. The questions specifically are as follows:
>
> "(1) Which law enforcement agency shall designate the tests to be administered in case the arrest is made by (a) the Sheriff's department (b) the city of Tiffin Police Department, (c) the City of Fostoria Police Department, (d) the Ohio State Highway Patrol operating in Seneca County, or (e) arrests by village constables or marshals?
>
> "(2) Can the law enforcement agency (whoever that may be) require a blood test when the suspect

is willing to consent to either a breath test or a urine test or visa versa?

"(3) Who pays the costs of such tests in the event that (a) the suspect is found guilty, and (b) if the suspect is subsequently found not guilty or is not charged with a crime of operating a vehicle under the influence of alcohol and/or drugs?

"(4) Since in our area the City Hospital of Fostoria and the Mercy Hospital in Tiffin, Ohio are the only two facilities equipped to take and interpret such tests, is the proper method to enter into contracts with these agencies for the use of their facilities on the basis of (a) a per unit test, to-wit: a flat charge for the taking of the test, interpreting the test and testifying, or (b) a charge for the taking of the test and interpreting the test and (c) a charge for testifying at the rate of so much an hour or day, (d) a fee paid directly to the pathologist who bills separately in our area."

Section 4511.191 (A), Revised Code, which was enacted by Amended Substitute House Bill No. 380, effective January 1, 1968, reads in pertinent part as follows:

"Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this state while under the influence of alcohol. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered."

Section 2935.03, Revised Code, as amended by Amended Substitute Senate Bill No. 29, effective December 13, 1967, reads in pertinent part as follows:

"A sheriff, deputy sheriff, marshal, deputy marshal, or police officer shall arrest and detain a person found violating a law of this state, or an ordinance of a

municipal corporation, until a warrant can be obtained.

"* * * * * * * * *

"A constable within the limits of the township in which said constable has been appointed or elected, shall arrest and detain a person found by him in the commission of a misdemeanor, either in violation of a law of this state or an ordinance of a village, until a warrant can be obtained."

State highway patrolmen derive their authority to arrest by virtue of Sections 2935.03 and 5503.02, Revised Code, and are commonly referred to as law enforcement officers. (See State v. Hatfield, 30 O.O. 2d, 350). Black's Law Dictionary, Fourth Edition, defines law enforcement officer as "those whose duty it is to preserve the peace."

"Agency" is defined in Webster's Third New International Dictionary as:

"A department or other administrative unit of a government" and also as "a person or thing through which power is executed or an end is achieved."

It would appear that the legislature used the term "law enforcement agency" in a broad sense, the same that "law enforcement officer" is used in a broad sense, and that depending upon the organization of the governmental activity the term may be interpreted to mean a department (police department), or an elected official (sheriff), or a division, (division of state highway patrol), or in cases of police constables designed as such and paid by a board of township trustees pursuant to Section 509.01, Revised Code, the board of township trustees would be the law enforcement agency by which the constable is employed.

Thus, with respect to qudstion 1 (a), the sheriff would be responsible for designating the tests to be administered; with respect to question 1 (b) and (c), the respective police departments; with respect to question 1 (d), the division of state highway patrol. With respect to question 1 (e), Section 737.15, Revised Code, provides in pertinent part that each village shall have a marshal appointed by the mayor and designated chief of police; thus, the police department would be the law enforcement agency in cases involving arrests by the village marshal or deputy marshal appointed under Section 737.16, Revised Code.

The answer to question two is contained in the literal word-

ing of the statute. Section 4511.191 (A), supra, clearly refers to test or tests, and there is no indication in the statute that the arrested person has a choice of the type of test to be administered; rather the statute clearly indicates that the option remains with law enforcement officials.

Inasofar as your third inquiry is concerned, Sections 4511.19 and 4511.191, Revised Code, are silent with respect to costs involved in the taking and the analyzing of the specimens of bodily substance, and a search of other Ohio statutes fails to reveal any authority for taxing such costs to the arrested person, regardless of the outcome of any subsequent criminal action, if any. As stated in 14 Ohio Jur. 2d, Costs, Section 2, pages 5 and 6:

> "Costs are entirely dependent upon statute and may be regulated, changed, or entirely taken away at the will of the legislature. Accordingly, the word 'costs' is not synonymous with 'expense,' and expenses are costs only when made so by statute."

Inasmuch as the statute states that the test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this state while under the influence of alcohol and the law enforcement agency by which such officer is employed shall designate which of the tests shall be administered, it would appear logical for the law enforcement agency designating the test or tests to bear the expense thereof. In the actual operation of the taking and analyzing of bodily substance, it seems clear that the agency through use of its own equipment and personnel or by arrangement with other governmental organizations, hospitals, or private associations would incur the legal obligation for the expense, and it would seem to be a normal item of budget for the agency.

I note that you refer to "drugs" in question three. Drugs, of course, do not come within the purview of Sections 4511.19 and 4511.191, Revised Code, and therefore will not be considered in this opinion.

With respect to your final question, I do not feel that it is within the province of this office to attempt to delineate the best method of contracting for the chemical tests. This involves essentially a business judgment. Thus, the type of contract to be entered into with a hospital is within the discretion of law enforcement agency making the contract.

In conclusion, it is my opinion and you are so advised that:

1. The term "law enforcement agency" as used in Section 4511.191 (A), Revised Code, refers to a police department, divi-

sion of state highway patrol, sheriff, or board of township trustees.

2. Pursuant to the provisions of Section 4511.191 (A), Revised Code, law enforcement agencies may designate which test or tests are to be administered unless such person has refused to be tested pursuant to the provisions of Section 4511.191 (D), Revised Code.

3. The law enforcement agency designating which test or tests are to be administered is responsible for the expense of such test or tests.

4. The method of contracting with hospitals for chemical tests is within the sound discretion of the agency incurring the legal obligation for payment of the expenses of the tests.

## OPINION NO. 68-042

Syllabus:

**Pursuant to Section 3501.10, Revised Code, the Board of Elections may establish more than one temporary branch office in a municipal corporation described in that Section and such branch offices may be established prior to a primary election.**

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To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William B. Saxbe, Attorney General, March 12, 1968

**You have requested my opinion whether the Board of Elections may establish more than one temporary branch office as provided for in Section 3501.10, Revised Code, and whether the Board may establish these temporary branch offices prior to a primary election.**

**Section 3501.10, Revised Code, provides in pertinent part as follows:**

> **"In counties containing municipal corporations in addition to the county seat, the board may maintain temporary branch offices in any or all municipal corporations for such time prior to the election as the board deems necessary." (Emphasis added)**

**I note that Section 3501.10, supra, provides that the Board may maintain temporary branch offices in any or all municipal corporations, thus clearly indicating that more than one temporary branch office could be established in the municipal corporations described. Had the legislature intended that only one temporary branch office could be established in each of these municipal corporations, it would have provided "the board may maintain a temporary branch office in any or all municipal corporations."**

**"The election" is not defined by the Revised Code for the purpose of Section 3501.10, supra. However, "general election", "regular municipal election", "regular state election", "special election", "primary election" have been defined by Section 3501.01, Revised Code. Inasmuch as there is a definition of the enumerated phrases which include the word "election" and no definition of "the election", I conclude that the legislature did not intend that "the election", to which reference is made in Section 3501.10, supra, was to be limited to any one of the elections defined.**

**It is, therefore, my opinion that the Board of Elections may establish more than one temporary branch office in a municipal corporation described in Section 3501.10, Revised Code, and that such branch offices may be established prior to a primary election.**

## OPINION NO. 68-048

**Syllabus:**

The residue of the undivided classified property tax fund shall be distributed, after the second settlement distributions as provided by Subdivisions (1),(2), (3) and (4) of Division (E), Section 5707.05, Revised Code, to any board of public library trustees and the school districts of the county. The budget commission may determine the amount to be distributed to each participant from the residue, except that any amount allowed to school districts shall constitute the county school tax fund and be distributed among all the school districts in the county, except the county school district, in the manner provided by law.

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**To: Everett Burton, Scioto County Pros. Atty., Portsmouth, Ohio**
**By: William B. Saxbe, Attorney General, March 14, 1968**

Your letter requesting my opinion presents the following question:

> May a County Budget Commission distribute the residue of the undivided classified property tax fund for a given year, after the second settlement, as supplemental receipts apportioned on the same basis as the original allocation of said fund for the given year, or must such residue fund be distributed to any board of public library trustees and the school districts of the County, as the County Budget Commission may determine.

By way of background, your letter also states:

> "On December 28, 1967, the Budget Commission of Scioto County, Ohio, apportioned the residue of the undivided classified property tax fund for 1966, after the second settlement,

in the amount of $18,407.88, on the same percentage basis as the original 1966 allocation, as follows:

| | |
|---|---|
| Library | $13,465.39 |
| Portsmouth corporation | 4,324.01 |
| Scioto County | 493.31 |
| South Webster | 79.15 |
| Otway Village | 46.02 |

"On December 28, 1967, the Budget Commission of Scioto County, Ohio apportioned the residue of the undivided classified property tax fund for 1967, after the second settlement, in the amount of $3267.83, on the same percentage basis as the original 1967 allocation, as follows:

| | |
|---|---|
| Library | $2,390.39 |
| Portsmouth corporation | 767.61 |
| Scioto County | 87.62 |
| South Webster | 14.05 |
| Otway Village | 8.16 |

"In making the distribution of the respective residues of the undivided classified property tax fund, the Budget Commission of Scioto County considered the residues as supplemental receipts to be apportioned on the same percentage basis as the original allocation, analogous to and within the intendment of the second paragraph of the Syllabus 1964 Ohio Attorney General's Opinion No. 1521 * * *"

In the law which provides for the levying of taxes upon intangible property at classified rates there are two separate classified intangible tax provisions. Section 5707.03, Revised Code, provides for a State collected intangible tax. Section 5707.04, Revised Code, provides for a County collected intangible tax.

Section 5707.03, Revised Code, provides in pertinent part:

"Annual taxes are hereby levied on the kinds of intangible property, enumerated in this section, on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of treasurer of state * * *

"The object and distribution of such taxes shall be as provided in section 5725.24 of the Revised Code."

Opinion No. 1521, Opinions of the Attorney General for the year 1964, to which your letter refers, relates to the distribution of revenue derived from Section 5707.03, Revised Code, as provided in Section 5725.24, Revised Code. The above-mentioned opinion has no application to Section 5707.04, Revised Code, to which your letter refers.

It is county-classified intangible property tax levied under the provisions of Section 5707.04, Revised Code, that we are concerned with here. Said Section provides in pertinent part:

"Annual taxes are hereby levied on the kinds

of intangible property, enumerated in this section, on the classified tax list in the office of the county auditor and the duplicate thereof in the office of the county treasurer * * *

"The object and distribution of the taxes so levied shall be as provided in section 5707.05 of the Revised Code."

Section 5707.05, Revised Code, provides that at the first settlement of undivided classified property taxes, the county treasurer shall distribute the undivided classified property tax fund in the county treasury pursuant to Divisions (A), (B), (C) and (D) of such Section.

Division (E) of Section 5707.05, Revised Code, provides that the residue in said undivided classified property tax fund, after making the deductions required by Divisions (A), (B), (C), and (D) of this Section, shall remain in the undivided classified property tax fund and shall be distributed as a part of said fund at the second settlement of undivided classified property taxes pursuant to Subdivisions (1), (2), (3) and (4) of Division (E), Section 5707.05, Revised Code. Note particularly that the fund distributions pursuant to Subdivisions (2), (3) and (4), Division (E), Section 5707.05, Revised Code, are limited in amount to one-half of such amount as the budget commission has allowed as a receipt from such source determined pursuant to the provisions of Section 5705.32, Revised Code. The balance, if any, after such second settlement distributions pursuant to Subdivisions (1), (2), (3) and (4), Division (E), Section 5707.05, Revised Code, constitutes the residue to be distributed as further provided by Division (E), Section 5707.05, Revised Code, which reads as follows:

"The residue of the undivided classified property tax fund shall be distributed to any board of public library trustees and the school districts of the county. The budget commission may determine the amount to be distributed to each participant from the residue, except that any amount allowed to school districts shall constitute the county school tax fund, and be distributed among all the school districts in the county, except the county school district, in the manner provided by law." (Emphasis added)

The distribution of the residue after the second settlement distributions as provided by Subdivisions (1), (2), (3) and (4) of Division (E), Section 5707.05, Revised Code, is mandatory. The county budget commission may not cause such residue to be distributed as supplemental receipts apportioned on the same basis as the original allocation of estimated funds for the given year.

I am of the opinion and you are advised that the residue of the undivided classified property tax fund shall be distributed, after the second settlement distributions as provided by Subdivisions (1), (2), (3) and (4) of Division (E), Section 5707.05, Revised Code, to any board of public library trustees and the school districts of the county. The budget commission may determine the amount to be distributed to each participant from the residue, except that any amount allowed to school districts shall constitute the county school tax fund and be distributed

among all the school districts in the county, except the county school district, in the manner provided by law.

## OPINION NO. 68-051

**Syllabus:**

The renewal of a tax levy authorized by Section 5705.20, Revised Code, for the support of tuberculosis hospitals or for the care, treatment, and maintenance of residents of the county who are suffering from tuberculosis or for the support of tuberculosis clinics may only be submitted to the electorate at the November election, pursuant to the provisions of Section 5705.25, Revised Code.

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**To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio**
**By: William B. Saxbe, Attorney General, March 15, 1968**

Your request for my opinion states that the Board of County Commissioners of Licking County passed the following resolution:

> "Be It Resolved by the Board of County Commissions, County of Licking, State of Ohio:
>
> "That a re-newal of a tax of 0.5 mill be placed on the May Primary ballot for 1968. Said tax to be for the diagnosis, prevention and treatment of tuberculosis, and that such funds be used for the hospitalization of persons infected with tuberculosis, the operation of a Tuberculosis Clinic and the maintenance of a Tuberculosis Registry. That said tax levy be collected for the tax years 1968; 1969; 1970; 1971; and 1972."

and you ask if the question of the renewal of the levy may properly be submitted at the May primary election.

The attempt by the Board of County Commissioners to place the above-described levy before the electorate at the May primary indicates a failure to distinguish between the tax levy authorized under Section 5705.191, Revised Code, and the tax levy authorized under Section 5705.20, Revised Code.

The tax levy authorized in Section 5705.191, Revised Code, is available to the taxing authority of any subdivision (except a board of education) for any of the purposes stated in Section 5705.19, Revised Code, or:

> "* * * to supplement the general fund for the purpose of making appropriations for one or more of the following purposes: relief, welfare, hospitalization, health, <u>and support of general or tuberculosis hospitals, * * *</u>" (Emphasis added)

This Section contains no limitation upon the amount of millage

outside the ten-mill limitation that may be authorized and the question of the excess levy may be submitted to the electors at either the May primary, or at a special election, or at the November general election.

On the other hand, the tax levy authorized in Section 5705.20, Revised Code, is a supplemental levy available to only the board of county commissioners for the purpose of supplementing general fund appropriations:

> "* * * for the support of tuberculosis hospitals, or for the care, treatment, and maintenance of residents of the county who are suffering from tuberculosis at hospitals with which the board has contracted pursuant to section 339.20 of the Revised Code, or for the support of tuberculosis clinics established pursuant to section 339.36 or section 339.39 of the Revised Code, * * *" (Emphasis added)

This Section does contain a limitation upon the amount of millage outside the ten-mill limitation which may be authorized, to wit: sixty-five one hundredths of a mill; and further provides that the levy shall be submitted in the manner provided in Section 5705.25, Revised Code.

Section 5705.25, Revised Code, provides in part that:

> "A copy of any resolution adopted * * * shall be certified by the taxing authority to the board of elections of the proper county prior to the fifteenth day of September in any year, and said board shall submit the proposal to the electors of the subdivision at the succeeding November election. * * *" (Emphasis added)

Hence, in order to determine whether the Licking County resolution may be submitted at the May primary, it is necessary to determine whether it is a renewal of a levy authorized by Section 5705.191, Revised Code, or a renewal of a levy authorized by Section 5705.20, Revised Code. Obviously, a levy authorized under one of these sections may not be renewed under the other section. The term "renewal" as it may be used in the ballot is restricted to a renewal of an existing levy in the same amount, Section 5705.25, supra.

In examining the wording of the resolution of the Board of County Commissioners, above quoted, it is apparent that the renewal contemplated is a renewal of a levy authorized by Section 5705.20, Revised Code, which relates to the support of tuberculosis hospitals, the maintenance of residents suffering from tuberculosis and support of tuberculosis clinics.

Therefore, since the county commissioners are attempting to renew a levy authorized under Section 5705.20, Revised Code, and it would be improper to submit it to the electorate at the May primary election, the resolution must, as provided in Section 5705.25, Revised Code, be submitted to the electorate at the November election.

## OPINION NO. 68-052

**Syllabus:**

1. In crediting "years of teaching service in another public school," a local board of education must include all years of teaching service in any elementary or secondary school which is a part of the public school system of this state.

2. A local board of education may, in the exercise of its discretion, evaluate a teacher's background and experience in giving credit for "years of teaching service" where such service was performed in any other school or in similar work experience.

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**To: Martin Essex, Supt. of Public Instruction, Department of Education, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, March 18, 1968**

I have before me your request for my opinion on the following question:

> "For purposes of teacher salary computations in the State Foundation formula, R.C. Section 3317.13 (A) (2) provides for the crediting of 'years of teaching service in another public school.'
>
> "In administering the provisions of this section, may 'public school' be construed to include a public elementary or secondary school in the United States and its possessions, or an elementary or secondary school operated by a state university, or an overseas dependents' school operated by the Department of Defense?
>
> "May 'public school' be construed to exclude a foreign school, a domestic non-public school, a college or university, and related work experience including the Peace Corps?"

Section 3317.13, Revised Code, reads in pertinent part as follows:

> "(A) As used in this section, 'years of service' includes the following:
>
> "(1) All years of teaching service in the same school district, regardless of training level, with each year consisting of at least one hundred twenty days under a teacher's contract;
>
> "(2) All years of teaching service in another public school, regardless of training level, with

each year consisting of at least one hundred twenty days under a teacher's contract; and

"(3) All years of active military service in the armed forces of the United States, as defined in section 3307.02 of the Revised Code to a maximum of five years.* * *"

This statute further provides for a minimum salary schedule for all teaching personnel employed in the public school system. Prior to this revision, a number of questions were raised over what should be included in crediting "years of service." I discussed this in Opinion No. 66-016, Opinions of the Attorney General for 1966:

"* * * * * * * * *

"I believe the intention of the legislature, in enacting Section 3307.02, supra, was to provide equal credit on the salary schedule for teaching service both within and without the district and for credit for service in the armed forces of the United States.

"A teacher with service acquired outside the district, consisting of a school year of actual service of at least one hundred twenty days under a teacher's contract, should be given the same increment credit for each such school year of service outside of the district as teachers acquiring service solely within the district so that the increments will be equal.

"* * * * * * * * *"

In enacting Section 3317.13, Revised Code, it seems the legislature intended to make clear that "years of service" included (1) all years in the same district and (2) all years in another public school which would include any public school in Ohio regardless of district.

"Another public school" as used in this section should include any elementary or secondary school in Ohio which is wholly or partly controlled and supported by public funds. There is no reason either in purpose or policy to give it a broader meaning. In providing for minimum salaries and crediting of "years of service" the legislature recognized that many teachers in our public school system may find it necessary to move to other areas within the state. Section 3317.13, supra, guarantees them a minimum salary based upon their years of teaching experience.

The State Board of Education has control over public schools within the State of Ohio and it issues teachers certificates pursuant to Sections 3319.22 to 3319.31, inclusive, Revised Code. It is inconceivable that a board of education should be required to give credit for teaching in a public school in another state when we have no control over the qualifications of that state's teachers. This should not be interpreted to prohibit a board giving credit in such a case but only that they should not be required to do so.

Section 3317.14, Revised Code, reads in pertinent part as follows:

> "Any board of education participating in funds distributed under Chapter 3317 of the Revised Code shall annually adopt a teacher's salary schedule with provisions for increments based upon training and years of service. Notwithstanding section 3317.13 of the Revised Code the board may establish its own service requirements provided no teacher receives less than the amount required to be paid pursuant to section 3317.13 of the Revised Code and provided full credit for a minimum of five years of actual teaching and military experience as defined in division (A) of section 3317.13 of the Revised Code is given to each teacher."

The above quoted statute permits any board of education to establish its own service requirements provided it meets the minimum salary requirements of Section 3317.13, supra, and provided full credit is given to each teacher for a minimum of five years of actual teaching and military experience as defined in Section 3317.13, supra. Thus, a board in evaluating a teacher's background and experience may decide to give credit for years of teaching service in the cases you mentioned.

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

(1) In crediting "years of teaching service in another public school," a local board of education must include all years of teaching service in any elementary or secondary school which is a part of the public school system of this state.

(2) A local board of education may, in the exercise of its discretion, evaluate a teacher's background and experience in giving credit for "years of teaching service" where such service was performed in any other school or in similar work experience.

## OPINION NO. 68-053

**Syllabus:**

A dog warden is permitted to sell a dog pursuant to Section 955.16, Revised Code, only to an organization or institution or servant of such institution or organization which has been certified by the Ohio public health council.

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**To: Richard O. Harris, Champaign County Pros. Atty., Urbana, Ohio**
**By: William B. Saxbe, Attorney General, March 21, 1968**

I have before me your letter expressing your concern over the interpretation to be given a recent opinion ren-

dered by this office. Opinion No. 68-016, Opinions of the Attorney General for 1968 (limited circulation), held in pertinent part that Section 955.16, Revised Code, does not authorize a county to contract with an individual or firm for the destruction of dogs.

Your letter insofar as it concerns the interpretation of the above mentioned opinion is set out below:

"* * * * * * * * *

"The same individuals and firms who were interested in contracting with the county commissioners for the destruction of those dogs are now presenting themselves to the dog warden as agents of the institutions and organizations certified by the Ohio Public Health Council as being engaged in teaching or research concerning the prevention and treatment of diseases of human beings or animals, to which the dog warden or pound-keeper is authorized to sell dogs pursuant to Section 955.16, Revised Code.

"Therefore, I request your opinion whether Section 955.16, Revised Code, authorizes a dog warden or pound-keeper to sell dogs to a person who represents himself as an agent of an Ohio institution or organization not for profit certified by the Ohio Public Health Council as being engaged in teaching or research concerning the prevention and treatment of diseases of human beings or animals."

Your question requires an examination of the power of a dog warden to sell dogs. The authority of the dog warden to act is controlled by statutes and by the public policy to be implemented by the statute. Unfortunately, there have been no judicial opinions interpreting Section 955.16, Revised Code, which would be helpful in answering your question. Likewise, legislative history is unavailable; therefore, the legislative interest must be abstracted from the language itself from the former above mentioned opinion of this office.

Section 955.16, Revised Code, provides in part as follows:

"* * * * * * * * *

"Any dog not redeemed within three days from the time it is seized and impounded may, upon payment to the dog warden or pound-keeper of the sum of three dollars, be sold to any Ohio institution or organization not for profit which is certified by the Ohio public health council as being engaged in teaching or research concerning the prevention and treatment of diseases of human beings or animals. Any dog so sold to any such institution or organization shall be discharged from said pound without

registration, and may be kept by such institution or organization without registration so long as said dog is used for such teaching and research purposes.

"Any institution or organization certified by the Ohio public health council which obtains dogs for teaching and research purposes pursuant to the provisions of this section, shall at all reasonable times make such dogs available for inspection by agents of the Ohio humane society, appointed pursuant to section 1717.04 of the Revised Code * * *

"* * * * * * * * *"

Among the policies expressed in Section 955.16, Revised Code, is that of insuring the humane treatment of dogs. The fact that unclaimed dogs may face certain and imminent death in no way detracts from the potency of this expressed policy. Therefore, it is appropriate to take appropriate precautions to insure the humane treatment of dogs. In this respect the actual physical handling or treatment of dogs is important.

Furthermore, Section 955.16, Revised Code, anticipates transfer directly from the dog warden to the certified institution or organization. There is no expression in that statute indicating that it would be appropriate for an independent contractor to purchase the dogs from the warden and then sell the same dogs to the certified institutions. Likewise, any profit obtained from dealings in the commodity of unclaimed dogs would be unwarranted.

Your letter implies that the existence of a true agency relationship between those actually purchasing the dogs and the certified organizations may be doubtful.

"An agent may be a servant or not a servant. An agent who is not a servant is one type of independent contractor. A servant is an agent in whose physical conduct the employer normally has the right to control." Seavey, Law of Agency, page 8, (1964). Thus, a servant is a member of that class of persons referred to as agents, while an independent contractor may or may not be an agent, but may not be a servant. "Included in the group of independent contractors who are agents are attorneys, auctioneers, brokers, factors * * * the other group which includes buyers, sellers, * * * [are not within that class referred to as agents]." Seavey, supra, page 8.

Because an agent may be an independent contractor not subject to the physical control of a principal and therefore not subject to inspection "by agents of the Ohio humane society, appointed pursuant to Section 1717.04", it is my opinion that a dog warden is permitted to sell a dog pursuant to Section 955.16, Revised Code, only to an organization or institution or servant of such institution or organization which has been certified by the Ohio public health council.

# OPINION NO. 68-054

**Syllabus:**

1. A non-charter municipality is without authority to contribute public funds to a river basin water quality control committee, a voluntary non-profit, non-governmental organization.

2. Whether or not a charter municipality is authorized to contribute public funds to such a committee must depend upon the form and content of the particular charter involved.

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**To: Roger Cloud, Auditor of State, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, March 22, 1968**

Before me is your recent request for my opinion which, in part, reads as follows:

> "Is it lawful for either a charter or non-charter municipality or both to contribute public funds to a river basin water quality control committee, a voluntary, nonprofit organization comprised of representatives of industry and local government, when such funds are to be used by the committee to defray part of the cost of employing consulting engineers to conduct a water quality control study for the river basin in which the municipality is located?
>
> "The question is an outgrowth of action taken in Ohio to comply with the Federal Water Quality Control Act of 1965. This act authorizes the federal government to establish water control standards on interstate streams. In the event matters discharged into interstate waters reduce the water quality below federal standards, the act further authorizes the federal government to undertake action to abate the discharge of such matters.
>
> "To promote compliance with the federal standards the Ohio Water Pollution Control Board has been encouraging formation of voluntary, nonprofit water control committees in various Ohio river basins. Committee membership is comprised of representatives of the industries and local governments located within a river basin. Each of these two groups contributes to the committee an amount equal to half the cost of conducting a water quality study within the basin, and the study is performed by consulting engineers employed by the committee."

You have further advised that the question presented results from the desire of the Muskingum River Basin Water Quality Control Committee to have the City of Canton expend public funds for studies to be made by said Committee.

It should first be noted that the Federal Water Quality Act is not here involved. That Act provided that if on or before June 30, 1967, a state did submit to the Secretary of Interior water quality criteria applicable to interstate waters or portions thereof within such state and a plan for implementation and enforcement of the water quality criteria, and the Secretary approved such criteria and plan, then they would be the water quality standards applicable to such interstate waters or portions thereof.

Should a state fail to submit to the Secretary of Interior the criteria and plan for the interstate streams, the Secretary could then set standards applicable to such state.

Pursuant to the Federal Water Quality Control Act, the Ohio Water Pollution Control Board did conduct public hearings and has submitted to the Secretary criteria and plans for all interstate streams in Ohio.

Inasmuch as the Muskingum River is an intrastate stream, criteria therefor and a plan for implementation was not submitted to the Secretary.

However, the Board is currently in the process of establishing water quality standards for all intrastate streams pursuant to the provisions of Section 6111.041, Revised Code, which provides, in part, as follows:

> "In furtherance of sections 6111.01 to 6111.08, inclusive, of the Revised Code, the water pollution control board shall adopt standards of water quality to be applicable to the waters of the state. Such standards shall be adopted pursuant to a schedule established, and from time to time amended, by the board, to apply to the various waters of the state according to criteria for the protection of the public health and welfare, the present and planned use of such waters for public water supplies, industrial and agricultural needs, propagation of fish, aquatic life, and wildlife, and recreational purposes. Such standards may be amended from time to time as determined by the board. Prior to establishing, amending, or repealing standards of water quality the board shall, after due notice, conduct public hearings thereon. Notice of hearings shall specify the waters to which the standards relate, and the time, date, and place of hearing."

To facilitate the proceedings at such public hearings and so the Water Pollution Control Board will have available to it comprehensive data upon which standards will be based, the Board has encouraged holders of permits issued by the Board to aid each other in the study of each basin in question. Collectively they could better study the problems of the basin and make a presentations to the Board.

Accordingly, in several river basins there have been established committees composed of representatives of industry, government and other interested persons. One such committee is the

Muskingum River Basin Water Quality Committee which has employed consulting engineers to study the basin and wishes the City of Canton to contribute to the cost of such study.

Your question is whether or not it is lawful for either a charter or non-charter municipality to contribute public funds to a river basin water quality control committee, a voluntary, non-profit, non-governmental organization, established for the purpose described above.

The established rule of law in this jurisdiction is that if a municipality adopts a charter, such municipality has the power thereunder to enact and enforce ordinances relating to local affairs. However, if a charter is not adopted, the organization and operation of such municipality is regulated by the statutory provisions covering the particular subject. State ex rel. Petit v. Wagner, 170 Ohio St. 297 (1960); Morris v. Roseman, 162 Ohio St. 447 (1954).

Though the contemplated action here involved is the expenditure of public funds, rather than the enactment of an ordinance, the question must be governed by the authority or power of the municipality to act.

It being clear that non-charter municipalities are limited by the provisions of the general law, I am of the opinion that the General Assembly has enacted no statutory provisions which authorizes such municipalities to contribute funds to the voluntary, non-governmental committees here in question.

The answer to the question of whether or not a charter municipality may contribute funds to such a committee is less than definite. The answer to each case, because of the wide variety of charter formulation possible, would depend upon the form and content of the particular charter involved. Opinion No. 851. Opinions of the Attorney General for 1964, page 65.

Therefore, it is my opinion and you are advised as follows:

1. A non-charter municipality is without authority to contribute public funds to a river basin water quality control committee, a voluntary non-profit, non-governmental organization.

2. Whether or not a charter municipality is authorized to contribute public funds to such a committee must depend upon the form and content of the particular charter involved.

## OPINION NO. 68-058

**Syllabus:**

A board of education of a school district is not required to provide transportation, under the provisions of Section 3327.01, Revised Code, to students attending a school for which the state board of education does not prescribe standards pursuant to division (D) of Section 3301.07 of the Revised Code.

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**To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio**
**By: William B. Saxbe, Attorney General, March 29, 1968**

I have before me your request for my opinion on the following question:

Does Section 3327.01, Revised Code, require a board of education to provide school bus transportation to schools for which the state board of education does not prescribe minimum standards pursuant to division (D) of Section 3301.07, Revised Code?

Section 3327.01, Revised Code, provides in part:

> "In all city, exempted village, and local school districts where resident elementary school pupils live more than two miles from the school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code and to which they are assigned by the board of education of the district of residence or to and from the non-public school which they attend the board of education shall provide transportation for such pupils to and from such school except when, in the judgment of such board, confirmed by the state board of education, such transportation is unnecessary or unreasonable.
>
> "In all city, exempted village, and local school districts the board may provide transportation for resident high school pupils to and from the high school to which they are assigned by the Board of education of the district of residence or to and from the non-public high school which they attend for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code.* * *"

The answer to your question requires an interpretation of the applicable portions of Section 3327.01, supra, to determine the intention of the legislature. The intention of the legislature must be determined primarily from the language of the statute itself. The language of the statute is its most natural expositor. Bates v. State, 27 Ohio App., 391.

It is presumed that the legislature, in phrasing a statute, knows the ordinary rules of grammar, and consequently, that the grammatical reading of a statute gives its correct sense. As stated by the court in Davis v. Halter, 79 Ohio App., 419, page 422: "We must give the language used its plain meaning according to the usages of English grammar."

Section 3327.01, supra, places a duty upon school districts to provide transportation for elementary school students that (1) live more than two miles from the school and (2) the school they attend is subject to the minimum standards adopted pursuant to Section 3301.07, Revised Code. This is true whether the student attends a public school or a private school.

The same interpretation should be given that portion of Section 3327.01, supra, which deals with the transportation of high school students except the school board is granted limited discretion as to whether any students should be transported, regardless of distance.

The use of the conjunction "or" is subject to the provisions of Section 1.02, Revised Code, which states:

> "As used in the Revised Code, unless the context otherwise requires:
>
> "* * * * * * * * *
>
> "(H) 'And' may be read 'or,' and 'or' may be read 'and' if the sense requires it."

In discussing statutory construction, the court stated in Lexa v. Smunt, 123 Ohio St. 510, page 515:

> "It is the duty of the court, if possible, so to construe statutes as to avoid absurd consequences.
>
> "Of the various meanings of the word 'or' it is quite clear that that meaning must have been intended by the Legislature in the enactment of this statute which serves to relate similar ideas and connect them to each other, * * *"

It is therefore my opinion and you are hereby advised that a board of education of a school district is not required to provide transportation, under the provisions of Section 3327.01, Revised Code, to students attending a school for which the state board of education does not prescribe standards pursuant to division (D) of Section 3301.07 of the Revised Code.

## OPINION NO. 68-060

**Syllabus:**

1. It is mandatory that an applicant for a barber's license under the reciprocity provision of Section 4709.19, Revised Code, prove by sworn affidavits that he has practiced as a barber in another state or country for at least two years immediately prior to making an application.

2. There is no requirement that an applicant filing pursuant to the requirements of Section 4709.19, Revised Code, state his intention to file under such section.

3. The State Board of Barber Examiners must specify the time for the next examination to an applicant who has failed his first examination pursuant to Section 4709.19, Revised Code, and such applicant need not file another application for the next examination.

4. The sworn affidavits required by Section 4709.19, Revised Code, should be furnished by the State Board of Barber Examiners, or some comparable body, in the state where the applicant claims to have been practicing.

5. There is no requirement that an applicant be a resident of any particular state in order to file an application pursuant to Section 4709.19, Revised Code.

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**To: Charles M. Dunbar, Secretary, State Board of Barber Examiners, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, April 1, 1968**

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

> "1. Under Section 4709.19, Revised Code, an applicant must prove by sworn affidavits that he has practiced as a barber in another state or country for at least two years immediately prior to making an application.
>
> "Is this a mandatory or discretionary requirement?
>
> "2. Must applicant for barber examination, by virtue of Section 4709.19, Revised Code, state his intention to file for examination under such section?
>
> "3. Regarding the provision of Section 4709.19, Revised Code, referring to the 'next examination', does this mean that the State Board of Barber Examiners has to specify the time for the next examination, or must the applicant request and file an application for such next examination?

"4. Under provisions of Section 4709.19, Revised Code, a barber who wishes to take examination under this section must 'prove by sworn affidavits that he has practiced as a registered barber in another state or country for at least two years immediately prior to making application in this state * * *'; based on this provision, I have two additional questions:

"(A) May these affidavits be required to be furnished by the State Board of Barber Examiners in the State in which the applicant claims to have been practicing, and show him to have been a licensed barber in that State?

"(B) Must the applicant, under Section 4709.19, Revised Code, be a resident of the State from which he is applying or can he be a resident of Ohio?"

Section 4709.19, Revised Code, formerly provided in part:

"(A) A person who is at least eighteen years of age and has a diploma showing graduation from an eighth grade grammar school, or an equivalent education as determined by an examination conducted under the supervision of a board of education, and either has a license or certificate of registration as a practicing barber from another state or country, which has substantially the same requirements for licensing or registering barbers as required by sections 4709.01 to 4709.23, inclusive, of the Revised Code, or who can prove by sworn affidavits that he has practiced as a barber in this state or in another state or country for at least two years immediately prior to making application in this state, shall upon payment of the required fee be issued a permit to practice as a journeyman barber until he is called by the board for examination to determine his fitness to receive a certificate of registration to practice barbering.

"If such applicant fails to pass the examination he shall be permitted to continue to practice as a journeyman barber until the next examination when he shall again be examined to determine his fitness to receive a certificate.

"Should any such applicant fail to pass three such examinations he shall not be eligible for further examination and shall not be qualified to continue to practice in this state.

"* * * * * * * * *"

The General Assembly amended this pertinent part of

Section 4709.19, Revised Code, as follows (effective December 20, 1967):

> "(A) A person who is at least eighteen years of age and has an eighth grade education, or an equivalent education as determined by an examination conducted under the supervision of the department of education, and has a license or certificate of registration as a practicing barber from another state or country, which has substantially the same requirements for licensing or registering barbers as required by sections 4709.01 to 4709.23, inclusive, of the Revised Code, and can prove by sworn affidavits that he has practiced as a registered barber in another state or country for at least two years immediately prior to making application in this state, shall upon payment of the required fee be called by the board for examination to determine his fitness to receive a certificate of registration to practice barbering.
>
> "If such applicant fails to pass the examination he shall be called for the next examination when he shall again be examined to determine his fitness to receive a certificate.
>
> "Should any such applicant fail to pass three such examinations he shall not be eligible for further examination and shall not be qualified to practice in this state. (Relevant changes in the 1967 amendment underlined)
>
> "* * * * * * * * *"

You first inquire as to whether the applicant's proof by sworn affidavit concerning practice in another state or country is mandatory or discretionary. I call your attention to the recent revision of Section 4709.19, supra. You will notice that the word "and" has been inserted prior to the provision concerning sworn affidavits and the word "or" deleted. Formerly the sworn affidavits were an alternative qualification under the statute in lieu of a license or certificate of registration. But it is now clear that both are mandatory requirements under the latest revision.

In response to your second question, there is nothing expressed in Section 4709.19, Revised Code, that requires an applicant to state his intention to file for examination specifically under this section.

Your third question is partially answered by reference to the change effected in the second paragraph of the recent revision of Section 4709.19 (A), supra. It provides that upon failing the first examination the applicant shall be "called for the next examination when he shall again be examined." Section 4709.11, Revised Code, provides:

> "The board of barber examiners shall conduct examinations for applicants for certificates of registration to practice as registered barbers and as registered ap-

prentices at least four times each year at such times and places as the board shall determine.

"Examinations shall include both a practical demonstration and a written and oral test, and shall relate only to barbering."

Correlation of the two above cited provisions dictates the conclusion that the State Board of Barber Examiners must specify the time of the next examination pursuant to Section 4709.11, Revised Code, and call for the applicant pursuant to Section 4709.19 (A), Revised Code. There is no requirement that the applicant file a new application for his second examination.

Your fourth question also refers to the revised Section 4709.19, supra. The statute does not expressly require the sworn affidavits to be furnished by the State Board of Barber Examiners of the state where the applicant claims to have been practicing, but it is obvious that the best evidence in such a situation would be from official records in other states, 21 Ohio Jur., 2d 273, Sections 255 and 261, and the most logical source would be the other State's Board of Barber Examiners, or some comparable body. This analysis is consistent with the statute's apparent intent to frustrate the applicant from producing an erroneous affidavit as a result of the applicant's intention or honest mistake. Thus, it is my opinion that these affidavits should be furnished by one who would reasonably be apprised of the facts of the affidavit and the State Board of Barber Examiners, or a comparable body, in the state where the applicant claims to have been practicing, would be the body most likely to have such facts.

Your final question concerns the applicant's state of residence under Section 4709.19, Revised Code. There is no requirement as to residence in any of the provisions of Chapter 4709, Revised Code. An applicant's residence is seemingly irrelevant under Section 4709.19, supra, which is concerned with qualifications for barbering in Ohio. Thus an applicant could be a resident of a neighboring state and still qualify to practice in Ohio under Section 4709.19, Revised Code.

Therefore, it is my opinion and you are informed that:

1. It is mandatory that an applicant for a barber's license under the reciprocity provision of Section 4709.19, Revised Code, prove by sworn affidavits that he has practiced as a barber in another state or country for at least two years immediately prior to making an application.

2. There is no requirement that an applicant filing pursuant to the requirement of Section 4709.19, Revised Code, state his intention to file under such section.

3. The State Board of Barber Examiners must specify the time for the next examination to an applicant who has failed his first examination pursuant to Section 4709.19, Revised Code, and such applicant need not file another application for the next examination.

4. The sworn affidavits required by Section 4709.19, Revised Code, should be furnished by the State Board of Barber

Examiners, or some comparable body, in the state where the applicant claims to have been practicing.

5. There is no requirement that an applicant be a resident of any particular state in order to file an application pursuant to Section 4709.19, Revised Code.

## OPINION NO. 68-061

**Syllabus:**

A board of education may not exclude from school an unmarried pregnant student, unless school attendance would be detrimental to her physical safety and well being.

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**To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio**
**By: William B. Saxbe, Attorney General, April 1, 1968**

I have before me your request for my opinion on the following question:

> "Recently this office received a written request to render an opinion as to the right of the school board of a school district to exclude from school an unmarried pregnant girl.
>
> "* * * * * * * * *"

The authority to expel a student from a public school is contained in Section 3313.66, Revised Code, which provides:

> "The superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may hold the hearing in executive session but may act upon the expulsion only at a public meeting.

The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended or expelled from any school beyond the current semester."

Of course expulsion of students must be considered in light of the compulsory school attendance law. Section 3321.01, Revised Code, provides in part:

"A child between six and eighteen years of age is 'of compulsory school age' for the purposes of Section 3321.01 to 3321.13, inclusive, of the Revised Code."

In the past this office has considered other aspects of the problem of pregnant students in public schools. A review of those opinions can serve as a foundation for the answer to your question.

In Opinion No. 120, Opinions of the Attorney General for 1963, I stated:

"It appears from all of the foregoing that the extent to which a board of education may go to the government of its student is quite far, and it appears that a morals situation such as we are discussing here is not so substantially dissimilar from the situations which were actually in the cases that a different result should obtain. Therefore, I conclude that a morals situation may properly be the basis for rules and regulations for the government of students.

"I further conclude that the following extra-curricular activities may be the subject of such rules and regulations: athletic competition, musical organizations, dramatics organizations and productions, social activities, class and school trips, cheerleading, class and school elective office, literary activities, military activities, service activities, scientific activities, scholastic activities, honor societies and honor organizations."

This opinion dealt with the power of the board of education to restrict and control the extra-curricular activities of an unwed student mother.

One of my predecessors considered another facet of this problem in Opinion No. 2998, Opinions of the Attorney General for 1962, which states in the syllabus:

"1. Under the rule-making powers of Sections 3313.20 and 3313.47, Revised Code, a board of education may not adopt a regulation automatically prohibiting attendance of married students, or married students who become pregnant, at activities of the school not offering credit towards graduation, but may adopt a rule which would, for the physical

safety of the student, require that at an advanced stage of the pregnancy a married pregnant student not attend such activities. (Opinion No. 2147, Opinions of the Attorney General for 1961, issued on April 27, 1961, affirmed and followed.)

"2. A board of education may adopt a rule which would prohibit the attendance of all unmarried pregnant students at such activities."

In Opinion No. 2998, supra, the then Attorney General stated:

"While pregnancy is a natural corollary to the married state, pregnancy of an unmarried student obviously presents a different situation. Where the unmarried student is concerned, the board of education might reasonably consider that the presence of the student could create an adverse effect on the moral (sic) of the student body, and might interfere with the proper discipline and government of the students. In such a case, I would consider it within the discretion of the board to adopt a rule barring such unmarried pregnant students from the activities here concerned, or from other activities of the school for that matter."

Again, in Opinion No. 2147, Opinions of the Attorney General for 1961, this office stated in the syllabus:

"1. A board of education may not adopt a regulation prohibiting attendance of all students under the age of eighteen who become married or, when married, become pregnant, as such would be contrary to the established public policy of this state as expressed in the compulsory education laws, Section 3321.01, et seq., Revised Code, which laws require a basic education for all children.

"2. For the same reason a board of education may not adopt a rule which would automatically prohibit the attendance of all married students who become pregnant, but may adopt a rule which would, for the physical safety of the student, require that at an advanced stage of the pregnancy a pregnant student not attend regular school classes.

"3. Pursuant to the provisions of Section 3319.08, Revised Code, a board of education may assign a teacher to the home instruction of a pregnant student who is not allowed to attend classes because of the pregnancy."

Thus it has been established that a school can control and restrict the extra-curricular activities of a pregnant student. Now let us consider the compulsory school law.

Section 3321.03, Revised Code, provides:

"Except as provided in this section, the parent, guardian, or other person having the care of a child of compulsory school age which child has not been determined to be incapable of profiting substantially by further instruction shall cause such child to attend a school which conforms to the minimum standards prescribed by the state board of education for the full time the school attended is in session, or shall otherwise cause him to be instructed in accordance with law. Every child of compulsory school age who has not been determined to be incapable of profiting substantially by further instruction shall attend a school which conforms to the minimum standards prescribed by the state board of education unless one of the following occurs:

"(A) The child receives a diploma granted by the board of education or other governing authority indicating such child has successfully completed the high school curriculum.

"(B) The child receives an age and schooling certificate as provided in section 3331.01 of the Revised Code.

"(C) The child is excused from school under standards adopted by the state board of education pursuant to section 3321.04 of the Revised Code."

The compulsory attendance law, Section 3321.04, Revised Code, states:

"Every parent, guardian, or other person having charge of any child of compulsory school age who is not employed under an age and schooling certificate and who has not been determined to be incapable of profiting substantially by further instruction, must send such child to a school, which conforms to the minimum standards prescribed by the state board of education, for the full time the school attended is in session, which shall not be for less than thirty-two weeks per school year. Such attendance must begin within the first week of the school term or within one week of the date on which the child begins to reside in the district or within one week after his withdrawal from employment.

"Excuses from future attendance at or past absence from school may be granted for the causes, by the authorities, and under the following conditions:

"* * * * * * * * *

"(1) That his bodily or mental condition does not permit his attendance at school during such period;

"* * * * * * * * *"

Compulsory education guidelines are discussed by the Supreme Court in State v. Gans, 168 Ohio St. 174, page 180:

> "After providing, in Section 3321.01, Revised Code, that 'a child /male or female/ between 6 and 18 years of age is of "compulsory school age,"' the General Assembly, in Section 3321.03, went on to provide that "every child of compulsory school age who is not employed under an age and schooling certificate and has not been determined to be incapable of profiting substantially by further instruction shall attend a school which conforms to the minimum standards prescribed by the state Board of Education, under the conditions prescribed by law.'
>
> "The General Assembly then stated, in Section 3321.04, that it is the duty of every parent to see that a child between 6 and 18 does in fact attend school unless excused therefrom for one or more of the reasons set out in the latter part of the statute. A close examination of those reasons fails to disclose that marital duties, such as house cleaning, cooking, washing, caring for infants, etc., are among them.
>
> "These sections of the Code exemplify another public policy of this state, which is that our free civilization in this country and in this state will maintain itself and advance only as its members become educated so as to be able to add their knowledge to that of their forefathers and thus progress.
>
> "We do not mean to imply that a high school education provides a modern person with world-shaking tools of knowledge such as those of the scientists who work with atomic energy. It seems beyond argument to this court, however, that a child who is not at least exposed to his own potentialities by a high school education (that contemplated by the statutes here under consideration) can hardly be expected to realize his potential either to himself or to his community, regardless of his basic or natural intelligence.
>
> "The court notes that a high school education is an absolute prerequisite to obtaining most jobs nowadays, and that it is most likely that Kay will need or want a job at sometime in the future
>
> "These are obviously the reasons for the public policy of this state regarding compulsory school attendance, as set out in Chapter 3321 of the Revised Code, and we are in wholehearted agreement therewith."

Thus it is readily apparent that compulsory education is

mandatory. The only exceptions are statutory and pregnancy is not an exception per se, although it may be a factor contributing to the physical safety of the student.

Therefore, it is my opinion and you are hereby advised that a board of education may not exclude from school an unmarried pregnant student, unless school attendance would be detrimental to her physical safety and well being.

## OPINION NO. 68-062

**Syllabus:**

A county auditor may hold office as a committeeman for a political party.

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**To: John E. Zimmerman, Defiance County Pros. Atty., Defiance, Ohio**
**By: William B. Saxbe, Attorney General, April 1, 1968**

I have before me your request for my opinion on the following question:

May a county auditor hold office as committeeman for a political party?

Amended Section 5715.51 of the Ohio Revised Code, effective December 11, 1967, reads as follows:

> "No member of the board of tax appeals, or any assistant, expert, clerk, or other employee of a county board of revision or the department of taxation shall hold any position on or under any committee of a political party, or subscribe or pay any money or other thing of value to any person or organization for the purpose of promoting, defeating, or otherwise influencing any legislation, or circulate any initiative or referendum petition. Whoever violates this section shall be removed from his office or employment."

If the county auditor is an employee of the Department of Taxation, as your letter suggests, then the specific prohibition of the statute is applicable. However, the distinction between an employee and a public official, which is discussed in The State, ex rel. Milburn v. Pethtel, 153 Ohio St. 1, is the governing test in determining whether the position one holds is that of employee or public official. Branch One of the syllabus in the Milburn case, supra, states as follows:

> "1. A public officer, as distinguished from an employee, is one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise functions

either of an executive, legislative or judicial character."

A county auditor is a public official and it is my opinion that although he may perform services for the Department of Taxation for the purpose of Section 5715.51, supra, he is not an employee of the Department of Taxation and therefore the services he performs for the Department of Taxation do not disqualify him from being committeeman for a political party. Further, the county auditor is a member of the county board of revision but according to the distinction made between public official and employee in the Milburn case, supra, he is not an employee of the county board of revision.

The stated purpose of House Bill No. 391, effective December 11, 1967, which amended Section 5715.51, supra, is "relative to limiting the prohibitions against political activity by certain officials." The legislature clearly indicated its intention that members of boards of revision are among the officials who were to be allowed to serve on a political committee while at the same time holding public office.

Therefore, it is my opinion and you are hereby advised that a county auditor may hold office as a committeeman for a political party.

## OPINION NO. 68-063

**Syllabus:**

1. The aggregate appropriation of a general health district, as fixed by the county budget commission, shall be apportioned by the county auditor among the townships and municipalities composing the general health district on the basis of taxable valuations in such townships and municipal corporations, pursuant to Section 3709.28, Revised Code. Such taxable valuations are based upon the taxable real and public utility property listed on the general tax list and duplicate compiled and made up pursuant to Section 319.28, Revised Code, and the taxable personal property listed on the general tax list and duplicate compiled and made up pursuant to Section 319.29, Revised Code. Such taxable valuations are not based upon the taxable personal property listed on the classified tax list and duplicate compiled and made up pursuant to Section 319.34, Revised Code.

2. When a county budget commission has properly fixed the aggregate appropriation of a general health district pursuant to Section 3709.28, Revised Code, and a special health levy, authorized by Section 3709.29, Revised Code, has been approved by the voters, the county budget commission may not reduce the aggregate appropriation previously fixed by such commission.

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**To: William E. Kessler, Miami County Pros. Atty., Troy, Ohio**
**By: William B. Saxbe, Attorney General, April 2, 1968**

Your letter requesting my opinion presents the following questions:

1. Is the apportionment of the aggregate appropriation for a general health district as provided by Section 3709.28, Revised Code, limited to real estate taxes or does it include personal property taxes?

2. If a special health levy for a general health district, authorized by Section 3702.29, Revised Code, is approved by the voters, may the county budget commission reduce the amount of township and village support previously assessed?

Your first question refers to Section 3709.28, Revised Code, which reads in part:

> "The aggregate appropriation, as fixed by the commission, less the amounts available to the general health district from the several sources of revenue, including the estimated balance from the previous appropriation, shall be apportioned, by the auditor among the townships and municipal corporations composing the health district on the basis of taxable valuations in such townships and municipal corporations. * * *" (Underlining added.)

What constitutes taxable valuations in such townships and municipal corporations is provided by Section 5705.49, Revised Code, which reads in part:

> "Wherever in the Revised Code, the taxing authorities of any subdivision, as defined in section 5705.01 of the Revised Code, are authorized to levy taxes on the taxable property within such subdivision, such authority shall extend only to the levy of taxes on the taxable property listed on general tax lists and duplicates, and such taxing authorities shall not levy taxes on the classified tax list and duplicate provided for by section 319.34 of the Revised Code. * * *"
>
> (Underlining added.)

What constitutes taxable property listed on general tax lists and duplicates includes the real and public utility property referred to in Section 319.28, Revised Code, and the personal property referred to in Section 319.29, Revised Code, but does not include taxable property listed on the classified tax list and duplicate provided for by Section 319.34, Revised Code.

Your second question refers to Section 3709.29, Revised Code, which reads in part:

> "If the estimated amount of money necessary to meet the expenses of a general health district program will not be forthcoming to

the board of health of such district out of the district health fund because the taxes within the ten-mill limitation will be insufficient, the board of health shall certify the fact of such insufficiency to the board of county commissioners of the county in which such district is located. Such board of county commissioners is hereby ordained to be a special taxing authority for the purposes of this section only, and, notwithstanding any other law to the contrary, the board of county commissioners of any county in which a general health district is located is the taxing authority for such special levy outside the ten-mill limitation. The board of county commissioners shall thereupon, in the year preceding that in which such health program will be effective, by vote of two thirds of all the members of said body, declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide an adequate amount for the necessary requirements of such district within the county, and that it is necessary to levy a tax in excess of such limitation in order to provide the board of health with sufficient funds to carry out such health program. Such resolution shall be filed with the board of elections not later than four p.m. of the ninetieth day before the day of election."

Section 5705.31, Revised Code, reads in part:

"The [county budget] commission shall ascertain that the following levies are properly authorized and if so authorized, shall approve the following levies without modification:

"* * * * * * * * *

"(E) The levies prescribed by section 3709.29 of the Revised Code.

"(F) Divisions (A), (B), (C), (D), and (E) of this section are mandatory and commissions shall be without discretion to reduce such minimum levies except as provided in such divisions." (Bracketed words added.)

Assuming a special health levy for a general health district was properly authorized and submitted to the voters pursuant to Section 3709.29, Revised Code, and thereafter properly approved by the voters, Section 5705.31, Revised Code, expressly provides that such levy shall be approved by the county budget commission without modification. The fact that such a special health levy was properly authorized and submitted to the voters pursuant to Section 3709.29, Revised Code, presupposes that the county budget commission had already completed its duties prescribed by Section 3709.28, Revised Code. In Opinion No. 738, Opinions of the Attorney General for the year 1957, at page 286, I pointed out that the then existing statutes did not provide for continuing supervision by the

county budget commission of the funds of a general health district and that when the county budget commission had performed the duties prescribed by Section 3709.28, Revised Code, it had no further duty or authority with respect to the estimates of expenses or the itemization thereof.

Section 3709.28, Revised Code, was recently amended (Amended Senate Bill No. 257, effective November 24, 1967), which amendment in part added the following provision:

> "Subject to the aggregate amount as has been apportioned among the townships and municipalities and as may become available from the several sources of revenue, the board of health may, by resolution, transfer funds from one item in their appropriation to another item, reduce or increase any item, create new items, and make additional appropriations or reduce the total appropriation. Any such action shall forthwith be certified by the secretary of the board of health to the auditor for submission to and approval by the budget commission."

This modification requires certain actions taken by the board of health be submitted to the budget commission for approval but does not authorize the budget commission to modify the aggregate amount initially determined pursuant to such section sua sponte, or otherwise.

I am of the opinion and you are advised that:

1. The aggregate appropriation of a general health district, as fixed by the county budget commission, shall be apportioned by the county auditor among the townships and municipalities composing the general health district on the basis of taxable valuations in such townships and municipal corporations, pursuant to Section 3709.28, Revised Code. Such taxable valuations are based upon the taxable real and public utility property listed on the general tax list and duplicate compiled and made up pursuant to Section 319.28, Revised Code, and the taxable personal property listed on the general tax list and duplicate compiled and made up pursuant to Section 319.29, Revised Code. Such taxable valuations are not based upon the taxable personal property listed on the classified tax list and duplicate compiled and made up pursuant to Section 319.34, Revised Code.

2. When a county budget commission has properly fixed the aggregate appropriation of a general health district pursuant to Section 3709.28, Revised Code, and a special health levy, authorized by Section 3709.29, Revised Code, has been approved by the voters, the county budget commission may not reduce the aggregate appropriation previously fixed by such commission.

## OPINION NO. 68-064

**Syllabus:**

The Cleveland Public Library may deduct insurance premium payments from the wages or salaries of its employees if the employees voluntarily elect to participate and the plan is one of those enumerated in Section 3917.04, Revised Code.

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**To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio**
**By: William B. Saxbe, Attorney General, April 2, 1968**

I have before me your request for my opinion which raises the following question:

> Does Section 3917.04, Revised Code, as amended, authorize the Cleveland Public Library to deduct premium payments from the salaries or wages of employees who wish to participate in a group insurance plan?

Section 3917.04, Revised Code, as amended by Amended Substitute House Bill No. 93, effective May 17, 1967 provides as follows:

> "If any employee of a political subdivision or district of this state, or of an institution supported in whole or in part by public funds, or any employee of this state, authorizes in writing the auditor or other proper officer of the political subdivision, district, institution, or the state of which he is an employee, to deduct from his salary or wages the premium or portion thereof agreed to be paid by him to an insurer authorized to do business in the state for life, endowment, accident, health, or health and accident insurance, annuities, or hospitalization insurance, or salary savings plan, such political subdivision, district, institution, or the state of which he is an employee may deduct from his salary or wages such premium, or portion thereof, agreed to be paid by said employee, and pay the same to the insurer provided, that life, endowment, accident, health, health and accident, and hospitalization insurance is offered to the employee on a group basis and that at least ten percent of the employees at any institution or of any political subdivision or in any department, agency, bureau, district, commission or board voluntarily elect to participate in such group insurance.
>
> "The auditor or other proper official of such political subdivision, district, institution, or the state of which he is an employee may issue

warrants covering salary or wage deductions which have been authorized by such employee in favor of the insurer and in the amount so authorized by the employee." (132 v. H 93. Eff. 5-17-67)

There is no authority in the Revised Code, which specifically or impliedly prohibits a public library from deducting premium payments from the wages or salaries of its employees. Since you state that the Cleveland Public Library is created by statute and supported in part by public funds, it is my opinion that it may deduct premium payments from wages or salaries of the employees if at least ten percent of the employees voluntarily elect to participate and the plan is one of those enumerated in Section 3917.04, supra, as amended and each employee desiring to participate authorizes in writing to the proper officer that portion to be deducted.

Therefore, it is my opinion and you are hereby advised that the Cleveland Public Library may deduct insurance premium payments from the wages or salaries of its employees if the employees voluntarily elect to participate and the plan is one of those enumerated in Section 3917.04, Revised Code.

## OPINION NO. 68-068

**Syllabus:**

A certificate of transfer issued by the Probate Court is not subject to the newly enacted real property transfer fee imposed by Section 319.54, Revised Code.

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**To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio**
**By: William B. Saxbe, Attorney General, April 16, 1968**

I have before me your request for my opinion involving an interpretation of Section 319.54, Revised Code, recently amended by Amended Substitute House Bill No. 919, effective December 12, 1967, which enactment imposes a county real property transfer fee on conveyances. The provision provides that the charge and collection of the transfer fee is the duty of the county auditor. Your specific question is as follows:

> Are certificates of transfer issued by the Probate Court subject to the imposition of this real property transfer fee?

It is a matter of prime importance, I believe, to observe that the statutory language of this, as well as the related sections of the Revised Code, limit the application of the transfer fee processsing to "conveyances." Section 319.54, supra, provides that the county auditor shall charge and receive one dollar, or ten cents per hundred dollars, or fraction thereof of the value of real estate conveyed. Thereafter, it is provided that the county auditor shall deposit receipts of the fees on conveyances in the county treasury.

Section 319.202, Revised Code, provides that before the county auditor indorses any real property conveyance, he shall make sure the transfer fee is paid or exempted. Section 317.22, Revised Code, dealing with the duties of the county recorder in this connection, provides that no deed of absolute conveyance of land or conveyance of minerals shall be recorded until the conveyance bears the stamp of the county auditor. We must, therefore, turn our attention to the nature of the certificate of transfer issued by the Probate Court. If it is a conveyance, it is subject to the transfer fee. However, if it is found not to be a conveyance, it is not subject to the fee.

I feel it is fundamental to the law of real property that the legal term "conveyance" is restricted to cases where the instrument itself serves to move title from one person to another, usually from the grantor to the grantee. Black's Law Dictionary, Fourth Edition, page 402, defines conveyance as:

> "* * * An instrument in writing under seal * * * by which some estate or interest in lands is transferred from one person to another * * *"

The definitive implications of Section 5302.03, Revised Code, appear to me to be of the same effect. When we examine Section 2113.61, Revised Code, describing the circumstances of the issuance of a certificate of transfer by the Probate Court, we see that a certificate of transfer is, in fact, an instrument reflecting the passage of title at an earlier time, to wit: the death of the decedent and previous owner. In the one instance, this is by operation of the laws of descent and distribution, and in the other, by virtue of the will of the testator. The certificate of transfer thus does not of its own vitality serve to transfer title. It must consequently fail to qualify as a conveyance.

It may be also observed, that the legislature has recognized this distinction in its enactments. For example, Section 319.20, Revised Code, provides that the county auditor shall, under the circumstances prescribed:

> "* * * transfer any land or town lot or part thereof, minerals therein, or mineral rights thereto, charged with taxes on the tax list, from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent, or otherwise. * * *"
>
> (Emphasis added.)

Section 319.54, supra, does enumerate a series of conveyances which are exempted from the transfer fee. But if a certificate of transfer fails to qualify as a conveyance, as I am so holding, it would not appear fitting that it be mentioned as an exempted conveyance.

In the interim since your request was received, Substitute Senate Bill No. 511, further amending Section 319.54, Revised Code, has been enacted as an emergency measure, effective March 10, 1968. Under this most recent amendment, certificates of transfer still are not subject to the transfer fee, but exemption is now for different reasons. As the statutory provision now reads, all transfers are included within the term "conveyance" but

certificates of transfer are specifically exempted by the newly amended Section 319.54 (F) (3) (n), Revised Code.

It is therefore my opinion and you are accordingly advised that a certificate of transfer issued by the Probate Court is not subject to the newly enacted real property transfer fee imposed by Section 319.54, Revised Code.

## OPINION NO. 68-069

**Syllabus:**

In any transfer presented prior to March 10, 1968, where it is indicated that the essential elements of execution and delivery have occurred in their entirety prior to January 1, 1968, said transfer was not made subject to the real property transfer fee imposed by Section 319.54, Revised Code. But transfers presented after March 10, 1968, are subject to the transfer fee, regardless of the time of execution and delivery of the instrument.

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**To: Elmer Spencer, Adams County Pros. Atty., West Union, Ohio**
**By: William B. Saxbe, Attorney General, April 16, 1968**

I have your request for my opinion concerning the applicability of Section 319.54, Revised Code, which imposes a real property transfer fee, to certain deeds which may or may not antedate the law.

You cite a particular deed in question before you and advise it was made, delivered, transferred and recorded in November, 1967, in a county other than Adams with adequate federal documentary stamp affixed, but which deed also covered real property in Adams County and was presented there January 10, 1968, for transfer by the county auditor.

The specific question is whether the county real property transfer fee is applicable to this deed.

The final paragraph of Section 319.54, Revised Code, as amended by Amended Substitute House Bill No. 919, effective December 12, 1967, provides:

> "No real property transfer fee provided for in division (F) (3) of section 319.54 of the Revised Code shall be applicable with respect <u>to the conveyance of real property unless such conveyance takes place on or after January 1, 1968</u>."
>
> (Emphasis added.)

I think at the outset it may be accepted that a conveyance takes place on the date on which the deed becomes effective. Perhaps another way of expressing this would be to say that the conveyance takes place on the date title moves from the grantor to the grantee.

The requirements of a deed causing title to move from grantor to grantee are not in a general way controversial. I think a summary quotation from 17 O. Jur. (2nd), Deeds, Section 53, may suffice. I quote, beginning at page 152:

> "It is well settled that in order to convey title by deed there must not only be a proper execution and acknowledgment of the deed, but also a delivery for the purpose of passing title. It is an elementary principle that a deed to be operative as a transfer of the ownership of real estate, must be delivered with intention by the grantor to sever his right to control the instrument further and an intention by the grantee to assume control over it. Delivery gives the instrument force and effect."

As counterpart of the foregoing, it may be observed that when execution, acknowledgment, and delivery of the deed has been made with the purpose of passing title, the deed has then become effective and the conveyance has "taken place" to use the specific words of Section 319.54, supra.

In the interim since your request, Section 319.54, Revised Code, has again been amended by the enactment of Substitute Senate Bill No. 511, which was signed by the Governor as an emergency measure and became effective March 10, 1968. The last paragraph of said Section 319.54 now reads:

> "The real property transfer fee provided for in division (F) (3) of this section shall be applicable to any conveyance of real property presented to the county auditor on or after January 1, 1968, regardless of its time of execution or delivery."

This amendment makes it quite clear that any instrument of transfer presented to the auditor after March 10, 1968, shall be subject to the transfer fee regardless of the time of execution or delivery. The only question which remains then relates to those instruments presented between January 1, 1968 and March 10, 1968.

Construing all of the provisions of the most recent enactment together with the related sections of the Revised Code in pari materia, the above quoted last paragraph of Section 319.54, supra, is at best ambiguous. But to construe the new law as applying to instruments otherwise exempt, presented prior to its effective date, would make this statutory language apparently unconstitutional. The transfer fee is in effect an excise tax upon the transaction of transferring real property of record. It is in this respect like a sales tax, the latter being an excise tax on the transaction of making a sale. The Supreme Court of Ohio has held that Section 28, Article II, Ohio Constitution provides that the General Assembly shall have no power to pass retroactive laws, and that a sales tax can operate prospectively only. See State ex rel. v. Ferguson, 133 Ohio St. 325. An attempt to tax transactions antedating the law is unconstitutional. See Safford v. Metrolpolitan Life Insurance Company, 31 Ohio App., aff'd, 119 Ohio St. 332.

It is an universally applied principle that an act will be

construed in such a way as to sustain its constitutionality if that is possible. Our Supreme Court in Co-op, Leg. Committee, et al. v. Public Utilities Commission, et al., 177 Ohio St. 101, held as follows in the second branch of the syllabus:

> "2. Where reasonably possible a statute should be given a construction which will avoid rather than a construction which will raise serious questions as to its constitutionality."

It is my opinion that it is not only reasonably possible, but is the more persuasive construction when considering these related provisions in pari materia, to find here the legislative intent to apply the provisions of the new act only to transfers presented after the effective date of the act, March 10, 1968.

I am, therefore, of the opinion that in any transfer presented prior to March 10, 1968, where it is indicated that the essential elements of execution and delivery have occurred in their entirety prior to January 1, 1968, said transfer was not made subject to the real property transfer fee imposed by Section 319.54, Revised Code. But transfers presented after March 10, 1968, are subject to the transfer fee, regardless of the time of execution and delivery of the instrument.

## OPINION NO. 68-070

**Syllabus:**

The law provides no authority to suspend, for any reason, the first thirty days of suspension or modify the revocation provided by Section 4507.16 of the Ohio Revised Code; however, a court may amend a suspension after the initial thirty days of the suspension period has passed.

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**To: Marshall E. Peterson, Greene County Pros. Atty., Xenia, Ohio**
**By: William B. Saxbe, Attorney General, April 16, 1968**

I have before me your recent request for my opinion concerning Section 4507.16 (B) of the Ohio Revised Code.

You have inquired whether or not the trial judge of any court of record may, when proceeding under Section 4507.16 (B), issue a special thirty-day permit to drive, for employment purposes only, to any person whose license is suspended or revoked pursuant to Section 4507.16 (B).

Section 4507.16, Revised Code, provides as follows:

> "The trial judge of any court of record shall, in addition to, or independent of all other penalties provided by law or by ordinance, suspend for not less than thirty days nor more than three years or revoke the license of any person who is convicted of or pleads guilty to any of the following:
>
> "(A) Homicide by vehicle;

"(B) Operating a motor vehicle while under the influence of intoxicating liquor or narcotic drug;

"(C) Perjury or the making of a false affidavit under sections 4507.01 to 4507.39, inclusive, of the Revised Code, or any other law of this state requiring the registration of motor vehicles or regulating their operation on the highway;

"(D) Any crime punishable as a felony under the motor vehicle laws of this state or any other felony in the commission of which a motor vehicle is used;

"(E) Failing to stop and disclose identity at the scene of the accident when required by law to do so.

"(F) Drag racing as defined in division (A) of section 4511.25 of the Revised Code.

"(G) Wilfully eluding or fleeing a police officer.

"The trial judge of any court of record shall, in addition to suspensions or revocations of licenses for periods of time not exceeding three years, and in addition to, or independent of, all other penalties provided by law or by ordinance, impose a suspended jail sentence not to exceed six months, providing that imprisonment was not imposed for the offense for which the person was convicted.

"After an operator's or chauffeur's license has been suspended or revoked, the trial court shall cause the offender to deliver to the court such license, and the court or clerk of such court shall, if such license has been suspended, or revoked in connection with any of the hereinbefore mentioned crimes, forthwith forward to the registrar such license together with notice of the action of the court.

"No court shall suspend the first thirty days of suspension of license provided for under this section."

If the trial judge elects to revoke a license pursuant to Section 4507.16, supra, that license has, for all practical purposes, ceased to exist. "Revoke" is defined by Black's Law Dictionary, Fourth Edition, as follows:

"To annul or make void by recalling or taking back, cancel, rescind, repeal, reverse. * * *"

Black's Law Dictionary defines "suspend" as follows:

"To interrupt; to cause to cease for a

time * * * to discontinue temporarily, but with an expectation or purpose of resumption. * * *"

The underlined portion of Section 4507.16, supra, delineates, in part, material recently added to such section by amendment. The legislature has answered your inquiry, in part, by providing that no court has authority to suspend, for any reason, the first thirty days of suspension of license provided by Section 4507.16, supra.

However, there is no provision which would prohibit a court from modifying such suspension after the first thirty day period of suspension has passed.

I cannot envisage how a revocation could properly be modified because the very nature of "revocation", as distinguished from "suspension", denotes a total cancellation of the privilege to operate a motor vehicle and the only way to restore this privilege would be to issue a new license.

In this connection, Section 4507.08, Revised Code, provides in pertinent part as follows:

> "No temporary instruction permit, operator's or chauffeur's license shall be issued to any person whose license, whether as operator or chauffeur, has been suspended, during the period for which such license was suspended, nor to any person whose license, whether as operator or chauffeur, has been revoked, under sections 4507.01 to 4507.39, inclusive, of the Revised Code, until the expiration of one year after such license was revoked."

Therefore, it is my opinion and you are accordingly advised that the law provides no authority to suspend, for any reason, the first thirty days of suspension or modify the revocation provided by Section 4507.16 of the Ohio Revised Code; however, a court may amend a suspension after the initial thirty days of the suspension period has passed.

## OPINION NO. 68-071

**Syllabus:**

A community improvement corporation organized pursuant to Chapter 1724, Revised Code, does not have authority to acquire and improve real estate which is to be leased, sold, or leased with option to purchase to the county board of library trustees.

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**To: Gene Henry, Geauga County Pros. Atty., Chardon, Ohio**
**By: William B. Saxbe, Attorney General, April 17, 1968**

Your request for my opinion states that your county has a community improvement corporation organized pursuant to Chapter 1724, Revised Code, and you ask whether the community improvement corporation can be designated as the agent for the county for civic development. By reason of a subsequent communication, I understand that by "civic development" the community improvement corporation proposes to acquire real estate, construct a building thereon suitable for library purposes and then lease the land and building to the county board of library trustees. In reality, your question is whether a community improvement corporation may acquire real estate and construct a building thereon which is to be leased to the county board of library trustees.

Your request also asks whether the interest paid upon bonds issued by a community improvement corporation pursuant to Sections 1724.02 and 1724.10, Revised Code, is subject to the federal income tax.

Section 1724.01, Revised Code, authorizes the organization of corporations not for profit for the purpose of advancing, encouraging and promoting the industrial, economic, commercial and civic development of a community or area. The not-for-profit corporations are vested with the powers specified in paragraphs (A) through (H), inclusive, of Section 1724.02, Revised Code. In respect to a community improvement corporation's dealing in real estate and making improvements thereto, paragraphs (C) and (D) of Section 1724.02, supra, provide that the corporation shall have the power:

> "(C) To purchase, receive, hold, lease, or otherwise acquire and to sell, convey, transfer, lease, sublease, or otherwise dispose of real and personal property, together with such rights and privileges as may be incidental and appurtenant thereto and the use thereof, including but not restricted to, any real or personal property acquired by the corporation from time to time in the satisfaction of debts or enforcement of obligations:
>
> "(D) To acquire the good will, business, rights, real and personal property, and other assets, or any part thereof, or interest therein, of any persons, firms, partnerships, corporations, joint stock companies, associations, or trusts, and to assume, undertake, or pay the obligations, debts, and liabilities of any such person, firm, partnership, corporation, joint stock company, association, or trust; to acquire improved or unimproved real estate for the purpose of constructing industrial plants or other business establishments thereon or for the purpose of disposing of such real estate to others in whole or in part for the construction of industrial plants or other business establishments: and to acquire, construct or reconstruct, alter, repair, maintain, operate, sell, convey, transfer, lease, sublease, or otherwise dispose of industrial plants or business establishments:" (Emphasis added.)

Section 1724.10, Revised Code, relates to the designation of a community improvement corporation as an agent of the political subdivision and provides in part:

> "A community improvement corporation may be designated by a county, one or more municipal corporations, or a county and one or more municipal corporations or two or more adjoining counties as the agency of each such political subdivision for the industrial, commercial, distribution, and research development in such political subdivision when the legislative authority of such political subdivision has determined that the policy of the political subdivision is to promote the health, safety, morals, and general welfare of its inhabitants through the designation of a community improvement corporation as such agency. Such designation shall be made by the legislative authority of the political subdivision by resolution or ordinance. Any political subdivision which has designated a community improvement corporation as such agency may enter into an agreement with it to provide any one or more of the following:
>
> "(A) That the community improvement corporation shall prepare a plan for the political subdivision of industrial, commercial, distribution, and research development, and such plan shall provide therein the extent to which the community improvement corporation shall participate as the agency of the political subdivision in carrying out such plan. Such plan shall be confirmed by the legislative authority of the political subdivision. A community improvement corporation may insure mortgage payments required by a first mortgage on any industrial, economic, commercial, or civic property for which funds have been loaned by any person, corporation, bank, or financial or lending institution upon such terms and conditions as the community improvement corporation may prescribe. A community improvement corporation may incur debt, mortgage its property acquired under this section or otherwise, and issue its obligations, for the purpose of acquiring, constructing, improving, and equipping buildings, structures, and other properties, and acquiring sites therefor, for lease or sale by the community improvement corporation in order to carry out its participation in such plan. * * *" (Emphasis added.)

Giving effect to the above-quoted statutes, a community improvement corporation is only authorized pursuant to Section 1724.02, supra, to acquire and improve real estate for the purpose of constructing industrial plants or other business establishments. As the agent designated by the political subdivision, pursuant to Section 1724.10, supra, the community improvement corporation is only authorized to acquire sites and construct, improve and equip buildings, structures and other properties pursuant to a plan, confirmed by the legislative authority of the political subdivision, for the industrial, commercial, distribution,

and research development of the community or area. The statutes do not authorize the designation of a community improvement corporation as an agent of the political subdivision for civic development and the use of a community improvement corporation as a vehicle for an alternative method of financing the needs of local governmental bodies cannot be implied.

In regard to your second point, the question of the federal income tax upon the interest paid on bonds issued by a community improvement corporation pursuant to Sections 1724.02 and 1724.10, supra, does not involve a matter of Ohio law and, accordingly, this office must therefore decline to express an opinion.

Therefore, it is my opinion and you are hereby advised that a community improvement corporation organized pursuant to Chapter 1724, Revised Code, does not have authority to acquire and improve real estate which is to be leased, sold, or leased with option to purchase to the county board of library trustees.

## OPINION NO. 68-072

**Syllabus:**

1. The determination of who shall appoint a person to hold the office of prosecuting attorney pursuant to Section 305.02, Revised Code, is contingent upon whether or not the last occupant of the office was elected as an independent.

2. The only residency requirement for one who is to be appointed to the office of county prosecuting attorney is that he be a resident of the State of Ohio for one year.

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**To: Homer B. Gall, Jr., Athens County Pros. Atty., Athens, Ohio**
**By: William B. Saxbe, Attorney General, April 17, 1968**

Your opinion request raises two questions:

(1) If there are no candidates for the office of county prosecuting attorney, who will appoint a prosecuting attorney?

(2) Must the appointee meet a residency requirement?

The answer to the first question is contained in the following paragraphs of Section 305.02, Revised Code:

"(A) If a vacancy in the office of county commissioner, prosecuting attorney, county auditor, county treasurer, clerk of the court of common

pleas, sheriff, county recorder, county engineer, or coroner occurs more than forty days before the next general election for state and county officers, a successor shall be elected at such election for the unexpired term unless such term expires within one year immediately following the date of such general election.

"In either event, the vacancy shall be filled as provided in this section and the appointee shall hold his office until a successor is elected and qualified.

"(B) If a vacancy occurs from any cause in any of the offices named in division (A) of this section, the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified, * * *

"* * * * * * * * *

"(D) If the last occupant of the office or the officer-elect was elected as an independent candidate, the board of county commissioners shall make such appointment at the time when the vacancy occurs, * * *

"* * * * * * * * *"
(Emphasis added)

Section 309.01, Revised Code, provides that a prosecuting attorney shall hold his office for four years. However, when a vacancy is filled pursuant to Sections 305.02 (B) or (D), Revised Code, Section 305.02 (A), Revised Code, requires that a successor to the appointee be elected at the next general election for state and county officers. Therefore, if a candidate is available at the next general election, even though the appointee has held the office of prosecuting attorney for less than four years, an election for that office must be held.

Therefore, it is my opinion that if the present prosecuting attorney is affiliated with a political party, the county central committee of that party shall appoint his successor. If the present prosecutor was elected as an independent candidate, the county commissioners shall make the appointment. Regardless of who makes the appointment, a successor must be elected at the following general election, if a candidate is available.

Turning to your second question, Section 4, Article XV, Ohio Constitution, provides:

"No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector."
(As amended Nov. 3, 1953; 125 v 1095.)

The qualifications of an elector are set out in Section 1,

Article V, Ohio Constitution, and Section 3503.01, Revised Code. Section 1, Article V, Ohio Constitution, provides in part:

> "Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

Section 3503.01, supra, provides in part:

> "Every citizen of the United States who is of the age of twenty-one years or over and who has been a resident of the state one year, of the county forty days, and of the voting precinct forty days next preceding the election at which he offers to vote has the qualifications of an elector and may vote at all elections, * * *"

Application of Section 3503.01, supra, raises the question whether a prospective appointee must qualify as an elector not only on a state-wide basis, but also in the county in which he will hold office.

This question was squarely before the Ohio Supreme Court in Jeffers v. Sowers, 171 Ohio St. 295 (1960). The issue there was whether a resident and elector of Athens County could be appointed to the office of county engineer of Vinton County. The court held that the term "elector", when used as a qualification for political office, means state elector, not county elector. An individual is classified as a county elector to determine where he must cast his vote, not to determine where he can hold political office. In order to be a state elector, one must be a resident of the state for one year.

Therefore, it is my opinion that the only residency requirement for one who is to be appointed to the office of county prosecuting attorney is that he be a resident of the State of Ohio for one year.

## OPINION NO. 68-074

**Syllabus:**

A petition of transfer circulated pursuant to the provisions of Section 3311.231, Revised Code, is invalid if it does not bear the affidavit of the circulator or circulators as prescribed by Section 3501.38, Revised Code.

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**To: George J. Demis, Tuscarawas County Pros. Atty., New Philadelphia, Ohio**
**By: William B. Saxbe, Attorney General, April 23, 1968**

Your request for my opinion reads as follows:

"A group of residents of one of our local school districts has filed a petition of transfer, asking that certain territory of Indian Valley Local School District be transferred to another school district. Said petition was filed in accordance with Section 3311.231 of the Revised Code of Ohio.

"Said petition was not notarized or signed by the circulators as such as required by Section 3501.38 of the Revised Code.

"Your Opinion 65-1 specifically requires that a referendum petition must be executed in accordance with Section 3501.38.

"My question is whether the initiating petition for transfer, as set forth in Section 3311.231 of the Revised Code, must also meet the requirements of Section 3501.38 of the Revised Code, as set forth by Opinion 65-1."

The applicable portions of Section 3311.231, Revised Code, pertaining to petitions of transfer of territory provides:

"A county board of education may propose, by resolution adopted by majority vote of its full membership, or qualified electors of the area affected equal in number to not less than fifty-five percent of the qualified electors voting at the last general election residing within that portion of a school district proposed to be transferred may propose, by petition, the transfer of a part or all of one or more local school districts within the county to an adjoining county school district or to an adjoining city or exempted village school district.

"* * * * * * * * *

"Any petition of transfer or petition of referendum under the provisions of this section shall be filed at the office of the county superintendent of schools. The person presenting the petition shall be given a receipt containing thereon the time of day, the date, and the purpose of the petition.

"The county superintendent shall cause the board of elections to check the sufficiency of signatures on any such petition, and, if found to be sufficient, he shall present the petition to the county board of education at a meeting of said board which shall occur not later than thirty days following the filing of said petition.

"The county board of education shall promptly certify the proposal to the board of elections of such counties in which school districts whose boundaries would be altered by such proposal are located for the purpose of having the proposal placed on the ballot at the next general or primary election which occurs not less than sixty days after the date of such meeting or at a special election, the date of which shall be specified in the certification, which date shall not be less than sixty days after the date of such meeting.

"Signatures on a petition of transfer or petition of referendum may be withdrawn up to and including the above mentioned meeting of the county board of education only by order of the board upon testimony of the petitioner concerned under oath before the board that his signature was obtained by fraud, duress, or misrepresentation.

"If a petition is filed with the county board of education which proposes the transfer of a part or all of the territory included either in a petition previously filed by electors or in a resolution of transfer previously adopted by the county board of education, no action shall be taken on such new petition as long as the previously initiated proposal is pending before the board or is subject to an election.

"Upon certification of a proposal to the board or boards of elections pursuant to this section, the board or boards of elections shall make the necessary arrangements for the submission of such question to the electors of the county or counties qualified to vote thereon, and the election shall be conducted and canvassed and the results shall be certified in the same manner as in regular elections for the election of members of a board of education."

*(Emphasis Added)

I note that Section 3311.231, supra, establishes the same procedure to be followed for both petitions of transfer and petitions of referendum.

Section 3501.38, Revised Code, provides:

"All declarations of candidacy, nominating petitions, or other petitions presented to or filed with the secretary of state or a board of elections or with any other public office for the purpose of becoming a candidate for any nomination or office or for the holding of an election on any issue shall, in addition to meeting the other specific requirements prescribed in the sections of the Revised Code

relating thereto, be governed by the following rules:

"* * * * * * * * *

"(E) Every petition paper shall bear the affidavit of the circulator that he witnessed the affixing of every signature, that all signers were to the best of his knowledge and belief qualified to sign, and that every signature is to the best of his knowledge and belief the signature of the person whose signature it purports to be."

With regard to referendum petitions filed under Section 3311.231, supra, I stated in Opinion No. 1, Opinions of the Attorney General for 1965 in Syllabus 1:

"1. A referendum petition circulated pursuant to the provisions of Section 3311.231, Revised Code, is invalid if it does not bear the affidavit of the circulator or circulators as prescribed by Section 3501.38, Revised Code."

In that Opinion I stated:

"Although Section 3501.38, Revised Code, does not specify that a petition is invalid where the circulators fail to affix their affidavit, it must be assumed that a petition not fulfilling the requirements of that section is invalid. If this were not so, there would be little reason for establishing such requirements."

Therefore it is my opinion and you are hereby advised that a petition of transfer circulated pursuant to the provisions of Section 3311.231, Revised Code, is invalid if it does not bear the affidavit of the circulator or circulators as prescribed by Section 3501.38, Revised Code.

## OPINION NO. 68-075

**Syllabus:**

The imposition of the transfer fee to a transfer presented after the effective date of Section 319.54 (F) (3), Revised Code, violates no constitutional provisions by reason of the fact that the instrument of transfer was required by an enforceable obligation which was in full force and effect prior to the date the real property transfer fee was enacted into law.

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**To: C. Howard Johnson, Franklin County Pros. Atty., Columbus, Ohio**
**By: William B. Saxbe, Attorney General, May 3, 1968**

I have before me your request for an opinion as to the constitutionality of applying the real property transfer fee imposed

by Section 319.54, Revised Code, to a deed or other instrument of transfer of title where delivery of the instrument is required by contract executed and of binding force prior to the effective date of the law. This might be a contract of sale or in the form of a land contract.

The real property transfer fee is in effect an excise tax upon the transaction of transferring real property of record. It is in this respect like the sales tax, the latter being an excise tax on the transaction of making a sale. The Ohio Supreme Court has held that Article II, Section 28 of the Ohio Constitution provides that the General Assembly shall have no power to pass retroactive laws. Safford v. Life Insurance Co., 119 Ohio St. 332. Sales and use taxes can operate prospectively only. State ex rel. v. Ferguson, 133 Ohio St. 325, at page 330. But the Supreme Court has also held that where the goods were delivered after the effective date of the act, the transaction is taxable even though the goods were contracted for prior to the date of the act. Dayton Rubber Mfg. Co. v. Glander, 149 Ohio St. 67. The Court therein rejected the argument of the appellant that the tax as so applied was unconstitutional as being retroactive and impairing the obligation of a contract. The reasoning of the Court here must be regarded, in my opinion, as dispositive of the contention advanced by the grantee in your case that the transfer fee is unconstitutional because of the pre-existing contract to convey.

It is therefore my opinion, and you are accordingly advised, that the imposition of the transfer fee to a transfer presented after the effective date of Section 319.54 (F) (3), Revised Code, violates no constitutional provisions by reason of the fact that the instrument of transfer was required by an enforceable obligation which was in full force and effect prior to the date the real property transfer fee was enacted into law.

## OPINION NO. 68-076

**Syllabus:**

A county does not become obligated for the expenditure of county funds except as a result of a contract made in conformity with the statutory requirements of Chapters 305 and 307 of the Revised Code, together with the certificate of the county auditor required by Section 5705.41 of the Revised Code.

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**To: Forrest P. Moore, Hocking County Pros. Atty., Logan, Ohio**
**By: William B. Saxbe, Attorney General, May 3, 1968**

I have before me your request for an opinion regarding the liability of the Hocking County Commissioners to participate in the construction of a county airport with the Hocking County Airport Authority. The airport authority desired to participate in the state airport building program (building of runways) in the amount of $100,000 and, in fact, did secure a grant subsidy for that amount. An additional sum of approximately $42,000 was necessary to construct the airport. The source of the excess was to come from the county. You state that the county commissioners

passed a resolution unanimously on June 8, 1967, as follows:

> "The Hocking County Commissioners in a regular session on June 8, 1967 do hereby pledge to provide the necessary money to complete the Hocking County Airport in accordance with Engineering plans approved by the Division of Aviation.
>
> "The above pledge is based on the promise of the State of Ohio to provide $100,000.00 of the cost and the serious efforts of the Hocking County Airport Authority to get the work done at the lowest practical cost."

Thereafter the airport authority, pursuant to open bidding, accepted a bid by a construction company in the amount of $141,880.22, but could not execute the construction contract because the county commissioners refused or failed to appropriate the amount of $41,880.22, and the airport authority treasurer could not certify the funds available.

Thereafter the county commissioners on November 30, 1967, passed a resolution with two "yes" votes and one "no" vote, as follows:

> "Motion made by Mr. Young that the Airport Authority enter into an agreement with Engle Construction Co., McArthur, Ohio, in the amount of $141,880.22 to proceed with the construction of an Airport in Hocking County, including the $100,000.00 Grant from the State of Ohio."

You set out your specific question as follows:

> "Based upon the facts set forth above including the action taken by the County Commissioners on two occasions, is the County obligated to provide to the airport authority the additional funds needed for the construction of the airport; that is, the $41,880.22 that is needed over and above the $100,000.00 grant that is available from the State of Ohio?"

The Hocking County Airport Authority is, of course, created by act of the county commissioners as specifically provided for in Chapter 308, Revised Code. There is no question of the statutory power of the county commissioners to contract with the airport authority regarding acquisition, maintenance, or operation of the airport and to pay the agreed portion of the expense thereof. Sections 307.20 and 717.01 (X) of the Revised Code. Nor is there any question of the power of the airport authority to enter into such a contract with the county. Section 308.06 of the Revised Code.

The case of City of Wellston v. Morgan, 65 Ohio St. 219, is a leading case expressing the Ohio law of contracts by public bodies. The court, as reviewed in the annotation 84 A.L.R. 936, at page 952, held that while the view has been held that the com-

mon law rule that municipalities are liable the same as individuals to pay as upon an implied promise, it has no application in Ohio, since the statute fully covers and provides the manner and only manner, in which a municipality may enter into a contract, agreement, or obligation; any other manner of entering into an obligation would be contrary to the provisions of the statute and void. There can, therefore, be no implied contract agreement or obligation against a municipality, and no implied liability. This same law is applicable to counties as to municipalities. Buchanan Bridge Co. v. Campbell, et al., 60 Ohio St. 406. The syllabus of this case reads:

> "A contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party."

Statutory provisions contained in Chapters 305 and 307 of the Revised Code set out a number of the statutory requirements for a valid obligation to arise binding upon the county commissioners and upon the county.

An additional requirement is provided by Section 5705.41, Revised Code:

> "No subdivision or taxing unit shall:
>
> "* * *(A) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, * * * has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of the appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void * * *"
>
> (Emphasis added.)

The Ohio Supreme Court in the first syllabus of State v. Kuhner, 107 Ohio St. 406, reads as follows:

> "1. The provision of Section 5660, General Code, that no contract or obligation involving the expenditure of money may be entered into by the public officials there designated unless the officer named first certifies that the money required is in the treasury to the credit of the fund from which it is to be drawn is mandatory, and the making of such certificate is a prerequisite to the execution of a valid contract, but it is not essential to the validity of such contract that the certificate be recorded."

In conclusion, it thus appears the board of county commissioners is not bound by any agreement unless these precise statutory requirements are complied with.

I am, therefore, of the opinion, and so hold, that a county does not become obligated for the expenditure of county funds except as a result of a contract made in conformity with the statutory requirements of Chapters 305 and 307 of the Revised Code, together with the certificate of the county auditor required by Section 5705.41 of the Revised Code.

## OPINION NO. 68-082

**Syllabus:**

In the county service, the various officers mentioned in Section 325.27, Revised Code, have the authority to approve the accumulation of unused sick leave in an amount greater than 90 days in accordance with Section 143.29, Revised Code.

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**To: Wayne Ward, Director, Dept. of State Personnel, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, May 15, 1968**

I have before me your request for my opinion concerning the accumulation of unused sick leave in the county service under Section 143.29, Revised Code. Specifically your request raises the question of whether the "responsible administrative officer of the employing unit" who has the authority to approve the accumulation of unused sick leave in an amount greater than 90 days is the appointing authority of each department or is the Board of County Commissioners the appointing authority?

Section 143.29, supra, reads in pertinent part as follows:

> "Each employee, whose salary or wage is paid in whole or in part by the state, and each employee in the various offices of the county service and municipal service, and each employee of any board of education, shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to illness, injury, exposure to contagious disease, which could be communicated to other employees, and to illness or death in the employee's immediate family. Unused sick leave shall be cumulative up to ninety work days, unless more than ninety days are approved by the responsible administrative officer of the employing unit.* * *
>
> "* * * * * * * * *"
>
> (Emphasis added)

Section 325.17, Revised Code, in pertinent part provides:

> "The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them, and shall file certificates of such action with the county auditor.* * *"

The officers mentioned in Section 325.27, Revised Code, are the county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, and county recorder.

Clearly, Section 325.17, supra, gives the various officers mentioned in Section 325.27, supra, the power to employ and discharge the employees of their respective offices. As a result, I can only conclude that the legislature intended that, as appointing authorities, they, or their administrative assistants, and not the Board of County Commissioners, have the authority to approve the accumulation of unused sick leave in an amount greater than 90 days in accordance with Section 143.29, supra.

It is therefore my opinion and you are hereby advised that in the county service, the various officers mentioned in Section 325.27, Revised Code, have the authority to approve the accumulation of unused sick leave in an amount greater than 90 days in accordance with Section 143.29, Revised Code.

## OPINION NO. 68-084

**Syllabus:**

Expenses incurred by the Registrar of Motor Vehicles in the administration of the county motor vehicle tax should be considered a normal item of the budget and such expenses cannot properly be assessed against Montgomery County.

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**To: Fred Rice, Registrar, Bureau of Motor Vehicles, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, May 29, 1968**

I am in receipt of your request for my opinion, which reads in part as follows:

"* * * * * * * * *

> "Will you kindly advise if the Registrar of Motor Vehicles may properly assess Montgomery County for this department's cost in collecting the local motor vehicle tax in that county. In addition to the cost of the forms noted, a fur-

ther cost to this department will occur in connection with additional personnel required for auditing and tax distribution purposes. Can this department assess Montgomery County for this additional cost?

"* * * * * * * * *"

At the outset, it is noted that the basic statute with respect to the payment of expenses of administering the law relative to the registration and operation of motor vehicles is the state highway safety fund established pursuant to Section 4501.06, Revised Code. This section reads in part as follows:

> "The taxes, fees, and fines levied, charged, or referred to in sections 4501.07, 4503.07, 4503.09, 4503.10, 4503.14, 4503.15, 4503.17, 4503.18, 4503.181 [4503.18.1] 4503.182 [4503.18.2], 4503.19, 4503.26, 4503.27, 4503.31, 4503.33, 4505.061 [4505.06.1] 4505.09, 4505.10, 4505.12, 4505.13, 4505.14, 4507.13, 4507.23, 4507.25, 4508.05, 4509.05, 4513.41, 4513.42, 4517.04, and 4517.05 of the Revised Code, unless otherwise designated by law, shall be deposited by the treasurer of state in a fund to be known as the 'state highway safety fund', and shall, * * * be used, subject to appropriation by the general assembly, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of motor vehicles on the public roads or highways and for the purpose of enforcing and paying the expenses of administering the law to provide reimbursement for hospitals on account of the expenses for the care of indigent persons injured in motor vehicle accidents." (Emphasis added)

It is further noted that sections of the Revised Code pertaining to the annual motor vehicle license tax levied by the state (Section 4503.02, Revised Code) and the local vehicle license tax (Sections 4504.02 and 4504.09, Revised Code) are not listed in Section 4501.06, supra, although these taxes are referred to in Section 4503.10, Revised Code.

Section 4504.02, Revised Code, establishes procedures for a levy of a county motor vehicle license tax at the rate of five dollars per motor vehicle on all motor vehicles, the district of registration of which is located in the county levying the tax.

Section 4504.09, Revised Code, reads as follows:

> "Any county motor vehicle license tax or any municipal motor vehicle license tax shall be paid to the registrar of motor vehicles or to a deputy registrar at the time application for registration of a motor vehicle as provided in section 4503.10 of the Revised Code is made and no certificate of registration or numbered license plates shall be issued to the owner of a motor vehicle for which any amount of county motor vehicle license tax or municipal motor vehicle license tax due thereon has not been paid. Payment of the tax shall be evidenced by a stamp on the certificate of registration by the official issuing such certificate and by issuance of a sticker, decal, or tag, the form of which and the manner of attachment to the vehicle shall be prescribed by the registrar of motor vehicles. From the sixteenth day of March to the sixteenth day of April of any given year, the owner of a motor vehicle may use such sticker, decal, or tag of either the current registration year or the next succeeding registration year.
>
> "* * * * * * * * *"

Section 4503.10, Revised Code, pertains to applications for registration of motor vehicles and the collection and transmission of the state license tax and the local tax. This section reads in pertinent part as follows:

> "Each deputy shall, upon receipt of any application for registration, together with the license fee and any county motor vehicle license tax or municipal motor vehicle license tax levied pursuant to Chapter 4504. of the Revised Code, transmit such fee and tax, if any, in the manner provided in this section together with the original and duplicate copy of the application to the registrar. A duplicate copy of the application shall also be sent to the auditor of any county levying a county motor vehicle license tax pursuant to section 4504.02 of the Revised Code to which such application for registration is subject or to the auditor or village clerk of any municipal corporation levying a municipal motor vehicle license tax pursuant to section 4504.06 of the Revised Code to which such application for registration is subject. The registrar, subject to the approval of the director of highway safety may deposit the funds collected by such deputies in a local bank or depository to

the credit of the 'state of Ohio, department of highways safety.' * * * The registrar, subject to the approval of the director and the auditor of state, may make reasonable rules and regulations necessary for the prompt transmittal of fees and for safeguarding the interests of the state and of the counties and municipal corporations levying county motor vehicle license taxes or municipal motor vehicle license taxes. * * *"

Section 4501.03, Revised Code, sets forth exact guidance for the distribution of the monies received in connection with both the state and local tax. This section reads in pertinent part as follows:

> "The registrar of motor vehicles shall open an account with each county and district of registration in the state. He shall pay all moneys received by him under sections 4503.02, 4503.12 and 4504.09 of the Revised Code, directly to the treasurer of state for distribution in the manner provided for in sections 4501.04, 4501.041, and 4501.042 of the Revised Code. All other moneys received by the registrar shall be deposited in the state highway safety fund established in section 4501.06 of the Revised Code and shall be subject to appropriation by the general assembly for the purposes enumerated in section 4501.06 of the Revised Code, unless otherwise provided by law." (Emphasis added)

Section 4501.04, Revised Code, provides for distribution of the state motor vehicle tax, Section 4501.041, Revised Code, pertains to the distribution of the county tax, and Section 4501.042, Revised Code, pertains to the distribution of a municipal motor vehicle license tax.

With respect to distribution of the county tax, Section 4501.041, supra, reads as follows:

> "All moneys received under section 4504.09 of the Revised Code with respect to counties levying county motor vehicle license taxes pursuant to section 4504.02 of the Revised Code and paid into the state treasury under section 4501.03 of the Revised Code, shall be distributed to the respective counties levying such taxes for allocation and distribution as provided in section 4504.05 of the Revised Code." (Emphasis added)

It is observed that pursuant to Section 4501.04, supra, the Treasurer of State is required to distribute revenue from the state license tax locally after receipt of certain certificates from the commissioners of the sinking fund and no money from the state or local tax revenue is placed in the highway safety fund out of which general expenses are paid.

Notwithstanding the fact that both Section 4503.02, supra, (state license tax) and Section 4504.02, supra, (local license tax) state that one of the purposes of the tax is for the payment of administering the tax, the other sections of the Revised Code require distribution of the monies without any withholding for the payment of expenses.

It is further noted that the Treasurer of State is the custodian of the fund to be distributed to the counties and districts of registration and is required to give a bond in the sum of three hundred thousand dollars, the premium on which shall be paid by the registrar from his appropriation for defraying the expenses incident to carrying out certain chapters of the Revised Code, including Chapter 4504, Revised Code. (See Section 4501.03, supra.)

It is therefore contemplated that you will look to appropriations by the legislature for expenses incident to administering the county license tax.

The current appropriation act is contained in Amended Substitute House Bill 537, effective July 2, 1967. It is noted that the legislature, to defray costs of manufacturing and distributing state license plates, appropriated $1,725,000 to "the state highway safety fund provided for in Section 4501.06 of the Revised Code, from undistributed revenues, as provided in Section 4503.02 of the Revised Code, including, but not limited to, revenues collected during the months of March and April, 1968; notwithstanding other provisions for the disposition of this revenue in the Revised Code."

Thus, although you are not authorized by the various sections of the Revised Code, cited above, to withhold money for the payment of expenses from the annual state license tax, the legislature does appropriate out of this money for expenses by a transfer to the state highway safety fund, and it is assumed that the legislature will in due course appropriate money for your expenses incident to collection and distribution of the county tax. Thus, although the legislature may in due course appropriate to the highway safety fund some of the county license tax money for your expenses in collecting and distributing the tax it has not, at present, done so.

Section 4504.05, Revised Code, reads as follows:

"The moneys received by a county levying

a county motor vehicle license tax shall be allocated and distributed as follows:

"(A) First, for payment of the costs and expenses incurred by the county in the enforcement and administration of the tax;

"(B) The remainder of such moneys shall be credited to funds as follows:

"(1) That part of the total amount which is in the same proportion to the total as the number of motor vehicles registered in the municipal corporations in the county to the total number of motor vehicles registered in the county in the most recent registration year ending on the fifteenth day of April shall be placed in a separate fund to be allocated and distributed as provided in section 4504.04 of the Revised Code.

"(2) The remaining portion shall be placed in the county motor vehicle license and gasoline tax fund and shall be allocated and disbursed only for the purposes specified in section 4504.02 of the Revised Code, other than paying all or part of the costs and expenses of municipal corporations in constructing, reconstructing, improving, maintaining, and repairing highways, roads, and streets designated as necessary and conducive to the orderly and efficient flow of traffic within and through the county pursuant to Section 4504.03 of the Revised Code."

A close reading of the sections of the Revised Code cited above fails to reveal any authority for the Registrar of the Bureau of Motor Vehicles to reimburse himself for expenses incurred in collecting and administering the county tax out of monies collected for the county tax either by a withholding from the county or by an assessment to the county after distribution of the money.

Section 4504.05, supra, clearly refers to costs and expenses incurred by the county and not the Registrar of Motor Vehicles, and the legislature directed the county to place the tax money in definite funds after payment of its costs and expenses. This would preclude the county from using the tax money for any purpose not specified by the legislature.

In conclusion, it is my opinion and you are so advised that expenses incurred by the Registrar of Motor Vehicles in the administration of the county motor vehicle tax should be considered a normal item of the budget and such expenses cannot properly be assessed against Montgomery County.

## OPINION NO. 68-085

**Syllabus:**

1. A board of education is not required to place a teacher on the salary schedule which would include one year of teaching credit when the teaching service consists of less than 120 days.

2. A school board may give credit this year for a full year's teaching service of less than 120 days so long as there is no retroactive pay, even if there is no written policy to that effect.

3. If a teacher under contract has been given credit for a fraction of a year's military service, it is not mandatory that he be given the same credit under the new salary schedule, if the new salary schedule provides an increase over the contract salary.

4. A board of education may this year give credit for less than eight months military service even if there is no written policy to that effect.

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**To: Frank P. Anzellotti, Jr., Mahoning County Pros. Atty., Youngstown, Ohio**
**By: William B. Saxbe, Attorney General, May 31, 1968**

I have before me your request for my opinion on the following questions:

> "1. A teacher has a signed contract prior to September 1, 1967, which placed him in a salary bracket that gave him credit for a full year's teaching service for less than 120 days. Must the Board now place him on the new salary schedule which would include the one-year teaching credit even though he had less than 120 days teaching service?
>
> "2. May the School Board this year give credit for a full year's teaching service for less than 120 days under a teacher's contract, if there is no written policy to that effect?
>
> "3. If a teacher under contract has been given credit for a fraction of a year's military service, is it mandatory that he be given the same credit under the new salary schedule if the new salary provides an increase over the contract salary?
>
> "4. May the School Board this year give credit for a fraction of a year's military ser-

vice if there is no written policy to that effect."

The question calls for an interpretation of Section 3317.13, Revised Code, which provides:

"Section 3317.13 (A): As used in this section, 'years of service' includes the following:

"(1) All years of teaching service in the same school district, regardless of training level, with each year consisting of at least one hundred twenty days under a teacher's contract;

"(2) All years of teaching service in another public school, regardless of training level, with each year consisting of at least one hundred twenty days under a teacher's contract; and

"(3) All years of active military service in the armed forces of the United States, as defined in section 3307.02 of the Revised Code, to a maximum of five years. For purposes of this calculation, a partial year of active military service of eight continuous months or more in the armed forces shall be counted as a full year."

A board of education is permitted to establish its own service requirements by Section 3317.14, Revised Code, which provides:

"Any board of education participating in funds distributed under Chapter 3317. of the Revised Code shall annually adopt a teachers' salary schedule with provision for increments based upon training and years of service. Notwithstanding section 3317.13 of the Revised Code, the board may establish its own service requirements provided no teacher receives less than the amount required to be paid pursuant to section 3317.13 of the Revised Code and provided full credit for a minimum of five years of actual teaching and military experience as defined in division (A) of section 3317.13 of the Revised Code is given to each teacher."

Additional facts indicate that the board of education has adopted a salary schedule on October 11, 1967 whereby a

teacher with no years experience is paid $4550.00 and with one year experience is paid $4730.00. The minimum salary schedule established by Section 3317.13 (C), provides for a salary of $4300.00 for no years experience, and $4480.00 for one year's experience.

There has been considerable confusion caused by these dual salary schedules. The salaries established by Section 3317.13 (C), are the minimum that shall be paid. There is no legal impairment to a board of education adopting a schedule which provides for larger salaries than the statutory minimum.

Under the provisions of Section 3317.13 (A), a year of teaching service consists of 120 days. Therefore, under the statute, the Board is not required to credit the teacher in question with a year of service and is only required to pay the teacher a salary of $4300.00.

In answer to your first question, it is my opinion that the Jackson-Milton Board of Education is not required by law to place a teacher who has signed a contract prior to September 1, 1967, which placed him in a salary bracket that gave him credit for a full year's teaching service for less than 120 days, on the new salary schedule which would include the one-year teaching credit, inasmuch as he had less than 120 days teaching service. Section 3317.13, Revised Code, sets a minimum standard. To comply with the minimum requirements for increments based in years of service for teaching, Section 3317.13 (A), (1), and (2), Revised Code, must be followed.

Since the year of service for teaching is not required by the above provisions of the code, I am of the opinion that this credit for one year of teaching service does not have to be given under the new salary schedule adopted at the October 11, 1967 meeting of the school board.

I am of the opinion that the school board may give credit this year for a full year's teaching service for less than 120 days under a teacher's contract, even though there is no written policy to that effect. The manifest intent of Chapter 3317, is to guarantee a minimum salary based upon experience and training. There is no suggestion in the code that a teacher shall not receive credit for training or experience above what has been guaranteed. Although the credit for teaching service posed by your question is not pursuant to a requirement established by the local board of education or the Revised Code, it is my opinion that the granting of this credit is clearly allowable under any relevant code provision.

A limitation on this authority of the school board to grant a salary increase is stated in Opinion No. 748, Opinions of the Attorney General for 1937, page 1354, which, in summary, holds that such an increase cannot be retroactive. This is the only limitation on the authority of the school board to grant increases in the situation posed by your question.

The minimum "years of service" requirement given on the basis of military service is set out in Section 3317.13 (A), (3), Revised Code, which provides as follows:

> "All years of active military service in the armed forces of the United States, as defined in section 3307.02 of the Revised Code, to a maximum of five years. For purposes of this calculation, a partial year of active military service of eight continuous months or more in the armed forces shall be counted as a full year."

I am of the opinion that if a year's credit for military service has been given when not required by Section 3317.13, Revised Code, this credit is not required to be carried over and given under the adopted teaching schedule. The reasons for this are the same as those given in answer to the first question of your inquiry.

I am of the opinion that the school board this year may give credit for a fraction of a year's military service even if there is no written policy to that effect.

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

1. A board of education is not required to place a teacher on the salary schedule which would include one year of teaching credit when the teaching service consists of less than 120 days.

2. A school board may give credit this year for a full year's teaching service of less than 120 days so long as there is no retroactive pay, even if there is no written policy to that effect.

3. If a teacher under contract has been given credit for a fraction of a year's military service, it is not mandatory that he be given the same credit under the new salary schedule, if the new salary schedule provides an increase over the contract salary.

4. A board of education may this year give credit for less than eight months military service even if there is no written policy to that effect.

## OPINION NO. 68-086

**Syllabus:**

Pursuant to Section 325.19, Revised Code, as effective November 4, 1959 through October 30, 1965, a county employee could accumulate vacation leave earned but not used.

Where unused vacation leave was accrued from October 30, 1965 through February 8, 1967, with permission of a prior appointing authority in accordance with Section 325.19, Revised Code, it is a valid obligation of the present appointing authority and may be paid subsequent to the date that such employee was separated from the county service.

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**To: George J. Demis, Tuscarawas County Pros. Atty., New Philadelphia, Ohio**
**By: William B. Saxbe, Attorney General, June 5, 1968**

I am in receipt of your letter which concerns a county employee whose service was terminated February 8, 1967. You first ask whether the employee in question is entitled to vacation pay for vacations earned since 1959 to the time of his separation and, if so, would this payment come out of the general fund of the county or from the fund of the department in which he worked at the time of his separation. Your second question asks whether the compensation for vacation earned would have to be approved by the present appointing authority or would the right of the employee be terminated if the present appointing authority is unwilling to consent to payment of said vacation pay.

In considering the questions you raise, I must point out the fact that the pertinent statutes with regard to both state and county employees are for the most part identical.

Section 325.19, Revised Code, effective November 4, 1959, in pertinent part provided:

> "Each full-time employee in the several offices and departments of the county service, including full-time hourly-rate employees, after service of one year, shall be entitled during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having fifteen or more years of county service are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay. Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. The annual leave during any one calendar year may be extended to include unused vacation leave of

previous years provided the total leave taken in any one year shall not exceed six weeks. An employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation." (Emphasis added)

"* * * * * * * * *"

Section 121.161, Revised Code, effective November 4, 1959, in pertinent part provided:

"Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, is entitled, during each year thereafter, to two calendar weeks, excluding legal holidays of vacation leave with full pay. Employees having fifteen or more years of service with the state are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay.

"Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. Upon separation from state service, except for cause, an employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation. (Emphasis added)

"* * * * * * * * *"

Section 325.19, Revised Code, was amended effective October 30, 1965 and provided in pertinent part as follows:

"Each full-time employee in the several offices and departments of the county service, including full-time hourly-rate employees, after service of one year, shall be entitled during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having ten or more years of county service are entitled, during each year thereafter, to three calendar weeks of vacation leave with full pay. Employees having twenty-five or more years of county service are entitled, during each year thereafter to four calendar weeks of vacation leave with full pay. Such vacation leave shall accrue to the employee upon each successive annual recurrence of the anniversary date of his employment; provided, the anniversary date may be deferred because of periods of time which the employee is not in active pay status. Days specified as holidays in section 143.12 of the Revised Code shall not be charged to an employee's vacation leave. Vacation leave shall

be taken by the employee during the year in which it accrued and prior to the next recurrence of the anniversary date of his employment; provided, the appointing authority may, in special and meritorious cases, permit such employee to accumulate and carry over his vacation leave to the following year. No vacation leave shall be carried over for more than two years. An employee shall be entitled to compensation, at his current rate of pay, for the pro-rated portion of any earned but unused vacation leave for the current year to his credit at time of separation, and in addition shall be compensated for any unused vacation leave accrued to his credit, with the permission of the appointing authority, for the two years immediately preceding the last anniversary date of employment. (Emphasis added)

"* * * * * * * * *"

Section 121.161, Revised Code, was amended effective July 22, 1965 and provided in part as follows:

"Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, is entitled, during each year thereafter, to eighty hours of vacation leave with full pay. A full-time employee with ten or more years of service with the state is entitled to one hundred twenty hours of vacation leave with full pay. A full time employee with twenty-five or more years of service with the state is entitled to one-hundred-sixty hours of vacation leave with full pay. Such vacation leave shall accrue to the employee upon each successive annual recurrence of the anniversary date of his employment; provided, the anniversary date may be deferred because of periods of time during which the employee is not in active pay status. Days specified as holidays in section 143.12 of the Revised Code shall not be charged to an employee's vacation leave. Vacation leave shall be taken by the employee during the year in which it accrued and prior to the next recurrence of the anniversary date of his employment; provided, the appointing authority may, in special and meritorious cases, permit such employee to accumulate and carry over his vacation leave to the following year. Effective January 1, 1966, no vacation leave shall be carried over for more than two years.

"Upon separation from state service, except for cause, an employee shall be entitled to compensation, at his current rate of pay, for the prorated portion of any earned but unused vacation leave for the current year to his credit at time of separation, and in addition shall be compensated for any unused vacation leave accrued to his credit, with permission of the appointing authority, for the two years immediately preceding the last anniversary date of employment." (Emphasis added)

In Opinion No. 65-199, Opinions of the Attorney General for 1965, I stated in branch 1 of the syllabus:

> "1. The amendment to Ohio Revised Code Section 325.19 which takes effect October 30, 1965, and states that no vacation shall be carried over for more than two years applies only to vacation earned after October 30, 1965."

In State ex rel. Sweeney v. Donahue, Case No. 8293, (affirmed 12 Ohio St. 2d 84) decided September 20, 1966 by the Court of Appeals of Franklin County, a state employee brought an action in mandamus against the Tax Commissioner to compel payment for his hours of unused vacation. The Court held under the law in effect from November 4, 1959, through relator's retirement in 1965 that he was clearly entitled to accumulate and be paid for unused vacation time. However, the Court denied recovery for any vacation leave acquired before the November 4, 1959 amendment.

On appeal, the Supreme Court held that:

> "* * * in none of the versions of the vacation-leave statute having effect over the period from January 16, 1935, until November 4, 1959, does the right to vacation leave with pay survive the year in which it arises. The entire claim for compensation of the appellant is founded upon this right to vacation leave with pay, and if the right itself no longer exists then no valid claim may be founded upon it."

From the foregoing, it is clear that the former employee in question is entitled to compensation for vacation earned from November 4, 1959 to the date of his separation. Thus where such compensation is due a former employee, it is a valid obligation of the employing authority of the department wherein he was employed at the date of his separation.

Your second question concerns whether the compensation for vacation earned would have to be approved by the present appointing authority. Section 325.19, supra, which had effect over the period from November 4, 1959 until October 30, 1965 specifically gave an employee who was separated from the county service the absolute right to compensation for any unused vacation leave to his credit. During this period there was no provision in the statute that the accumulation of unused vacation leave was subject to the permission of the appointing authority.

From October 30, 1965 through February 8, 1967, the employee's separation date, Section 325.19, supra, gave an employee separated from the county service the right to compensation for any unused vacation leave accrued to his credit, with permission of the appointing authority. Thus where the unused vacation leave was accrued with permission of a prior appointing authority it is a valid obligation of the present appointing authority and may be paid subsequent to the date that such employee was separated from the county service.

Answering your specific questions, it is my opinion and you

are advised:

Pursuant to Section 325.19, Revised Code, as effective November 4, 1959 through October 30, 1965, a county employee could accumulate vacation leave earned but not used.

Where unused vacation leave was accrued from October 30, 1965 through February 8, 1967, with permission of a prior appointing authority in accordance with Section 325.19, Revised Code, it is a valid obligation of the present appointing authority and may be paid subsequent to the date that such employ was separated from the county service.

## OPINION NO. 68-087

**Syllabus:**

Neither the state nor any of its political subdivisions may operate as a Community Action Agency inasmuch as the federally imposed employment guidelines are not consonant with the Ohio Constitution and the civil service statutes of this state.

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**To: Robert H. Huffer, Pickaway County Pros. Atty., Circleville, Ohio**
**By: William B. Saxbe, Attorney General, June 5, 1968**

I have before me your request for my opinion on the following matter:

> "Under the 1967 Amendments to Section 210 of the Economic Opportunity Act, can a political subdivision, as a county or city, operate under its (home rule) powers, a public Community Action Agency as a department, division or otherwise and meet the requirements of the above named act and the accompanying Office of Economic Opportunity guidelines."

Section 210 of the Economic Opportunity Act. Title 42, Section 2781, et seq., U.S.C.A., as amended provides in part:

> "(a) A community action agency shall be a State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions, or a public or private nonprofit agency or organization which has been designated by a State or such a political subdivision or combination of such subdivisions, which -
>
> "(1) has the power and authority and will perform the functions set forth in section 212, including the power to enter into contracts with public and private nonprofit agencies and organizations to assist in fulfilling the purposes of this title, and
>
> "(2) is determined to be capable of planning, conducting, administering and evaluating a community action program and is currently designated as a community action agency by the Director."

The purpose of amending the Act was to require greater involvement of state and local officials in community action programs. Section 213 (b) of the Economic Opportunity Act authorizes the Director to prescribe rules and regulations to supplement the Act. In the handbook, Organizing Community For Action, the Office of Economic Opportunity sets forth the guidelines and policies which raise the question of whether a state or political subdivision itself could serve as a community action agency.

> "In order for a CAA to be recognized by OEO it must among other things,
>
> -have legal authority under State or local law to:
> -conduct a community action program;
> -contract with and delegate to public or private organizations (including religious organizations) the operation of programs;
> -give preference to the employment of poor people and persons over 55 years of age; and
> -receive, administer, and transfer funds.
>
> "Where a political jurisdiction lacks one of the vital powers or where it is of insufficient size it may designate another public or private non-profit agency which would have such powers and be of sufficient size.* * *"

A more detailed description of the employment requirements is set forth in Community Action Memorandum No. 80, Part B, 9. It reads as follows:

> "9. In connection with the community action program, the community action agency must be free from employment rules or restrictions which would prevent:
>
> "(a) The hiring of any qualified poor person, in preference to other qualified persons who are not poor.
>
> "(b) The hiring of any qualified person who lives in the neighborhood or area where the job is to be performed, in preference to other qualified persons who do not live there.
>
> "(c) The employment of persons without any fixed upper age limit.
>
> "(d) Restriction of non-professional jobs to particular types of persons because of their relationship to the program or its beneficiaries (for example, parents of pre-school children, manpower trainees, the elderly, tenants of a particular project or block).
>
> "(e) The hiring of any person who can per-

form a non-professional job, even though he lacks a formal education.

"(f) The hiring of an otherwise qualified person solely because he has a criminal record, unless that record casts doubt on his ability to perform the particular job with integrity and without danger to the program participants.

"(g) The employment of persons without regard to their race, creed, color, or national origin.

"(h) The payment to program employees of the current Federal minimum wage for employment in interstate commerce ($1.60 an hour as of February 1, 1968)."

Section 10, Article XV, Ohio Constitution, provides:

"Appointments 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."

This section has been implemented by the enactment of Chapter 143, Revised Code, which establishes the civil service laws of this state. It is clear that the preferential hiring made mandatory by the Office of Economic Opportunity guidelines are in contravention of our Constitution and laws. Thus, neither the state nor a political subdivision of the state could meet the requirements set forth in the guidelines. Since this would prevent either from serving as a Community Action Agency itself, it is not necessary to examine the other requirements imposed by the guidelines and the Act.

It is therefore my opinion and you are hereby advised that neither the state nor any of its political subdivisions may operate as a Community Action Agency inasmuch as the federally imposed employment guidelines are not consonant with the Ohio Constitution and the civil service statutes of this state.

## OPINION NO. 68-088

**Syllabus:**

1. A political subdivision of the State of Ohio may not designate itself as a community action agency.

2. A private non-profit corporation may provide by its charter to have the necessary powers to be a community action agency.

3. The designation of a private non-profit corporation as a community action agency by the board of county commissioners would not be an illegal delegation of authority under Ohio law.

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**To: Albert G. Giles, Director, Ohio Bureau of Urban Affairs, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, June 5, 1968**

Your request for my opinion reads in pertinent part:

"As you know, the Ohio Office of Opportunity which is a part of this Department, provides technical assistance with respect to community action activities conducted in the state under the terms of the federal Economic Opportunity Act. The amendments to the Economic Opportunity Act which were enacted by Congress in 1967 (P.L. 90-222), provided major changes in the criteria for determining what bodies and organizations can qualify as community action agencies. As a result, there is some question as to what organizations in Ohio can qualify, under the terms of the act and the implementing statement of policy and administrative procedure to conduct community action programs.

"In order that this Department may be enabled to discharge its duties with respect to community action programs, I should like your opinion on the following questions:

"1. What political subdivisions of the state may comply with the requirements of the act and the statement of policy and administrative procedure so as to qualify as a community action agency?

"2. Under Ohio law, may a private nonprofit organization qualify as a community action agency in accordance with the terms of the Economic Opportunity Act, as amended in 1967 (P.L. 90-222) and the statement of policy and administrative procedure issued by the Office of Economic Opportunity?

"3. Would the designation by a political subdivision of a private nonprofit agency to serve as a community action agency amount to a delegation, by the subdivision, of power or authority?

"4. If the answer to question three is 'yes', would such a delegation be a proper one under Ohio law?

"A copy of the Economic Opportunity Act, as amended, and the implementing statement of policy and administrative procedure is enclosed for your convenience."

Section 210 of Public Law 90-222 reads in pertinent part:

"(a) A community action agency shall be a State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions, or a public or private nonprofit agency or organization which has been designated

by a State or such a political subdivision or combination of such subdivisions, which -

"(1) has the power and authority and will perform the functions set forth in section 212, including the power to enter into contracts with public and private nonprofit agencies and organizations to assist in fulfilling the purposes of this title, and

"(2) is determined to be capable of planning, conducting, administering and evaluating a community action program and is currently designated as a community action agency by the Director.

"* * * * * * * * *

"(d) The Director may designate and provide financial assistance to a public or private nonprofit agency as a community action agency in lieu of a community action agency designated under subsection (a) for activities of the kind described in this title where he determines (1) that the community action agency serving the community has failed, after having a reasonable opportunity to do so, to submit a satisfactory plan for a community action program which meets the criteria for approval set forth in this title, or to carry out such plan in a satisfactory manner, or (2) that neither the State nor any qualified political subdivision or combination of such subdivisions is willing to be designated as the community action agency for such community or to designate a public or private nonprofit agency or organization to be so designated by the Director."

It is stated at page 11 of the introductory material as follows:

"In order for a CAA to be recognized by OEO it must among other things,

- have legal authority under State or local law to:
  - conduct a community action program;
  - contract with and delegate to public or private organizations (including religious organizations) the operation of programs;
  - give preference to the employment of poor people and persons over 55 years of age; and
  - receive, administer, and transfer funds.

"Where a political jurisdiction lacks one of the vital powers or where it is of insufficient size it may designate another public or private non-

profit agency which would have such powers and be of sufficient size.* * *"

Furthermore, Memorandum No. 80 of the Office of Economic Opportunity, Part B, 9, provides as follows:

"9. In connection with the community action program, the community action agency must be free from employment rules and regulations which would prevent:

"(a) The hiring of any qualified poor person, in preference to other qualified persons who are not poor.

"(b) The hiring of any qualified person who lives in the neighborhood or area where the job is to be performed, in preference to other qualified persons who do not live there.

"(c) The employment of persons without any fixed upper age limit.

"(d) Restriction of non-professional jobs to particular types of persons because of their relationship to the program or its beneficiaries (for example, parents of pre-school children, manpower trainees, the elderly, tenants of a particular project or block).

"(e) The hiring of any person who can perform a non-professional job, even though he lacks a formal education.

"(f) The hiring of an otherwise qualified person solely because he has a criminal record, unless that record casts doubt on his ability to perform the particular job with integrity and without danger to the program participants.

"(g) The employment of persons without regard to their race, creed, color, or national origin.

"(h) The payment to program employees of the current Federal minimum wage for employment in interstate commerce ($1.60 an hour as of February 1, 1968)."

The State of Ohio and all of its political subdivisions are bound by the Ohio Constitution and general laws with respect to their employment practices.

Section 10, Article XV of the Ohio Constitution provides:

"Appointments 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."

Inasmuch as this provision of the Constitution is not self-executing, the general assembly has provided Chapter 143, Revised Code, as the civil service law of this state. As a result of the preferential employment practices required by the federal guidelines, it would be impossible for the state or any of its political subdivisions to operate as a Community Action Agency.

Chapter 1702, Revised Code, provides for the incorporation of non-profit corporations. There would seem to be no limitations set by law as to the powers or authority of such a corporation. Of course its charter must reflect its purposes and authority. As a result, there would be no reason that a non-profit corporation could not adequately meet the requirements set by the guidelines if its charter so provided.

Your third and fourth questions inquire whether the designation by a political subdivision of a Community Action Agency would constitute an illegal delegation of authority.

Webster's Third New International Dictionary defines "designation" as "the act of indicating or identifying by a mark, letter, or sign or by classification or specification; naming." "Delegation" on the other hand is defined as "the act of investing with authority to act for another."

It is obvious from the definitions, supra, that a designation does not in and of itself transfer any authority from the designator to the designee and this would be especially true where there is not any duty or power which may be delegated by the act.

Furthermore, Section 307.85, Revised Code, reads as follows:

> "The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted prior to or after the effective date of this act by the congress of the United States, and for such purposes may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state."

This statute, then, specifically and expressly provides authority for the cooperation of counties in federal programs such as the one here under discussion. The county commissioners clearly could designate a private non-profit corporation to be the community action agency. There has been no similar statute passed which gives similar authority to a municipality.

The authority to directly recognize a community action agency where there has been no designation is reserved to the Director of the Office of Economic Opportunity by subsection (d), Section 210, supra.

Therefore, it is my opinion and you are hereby advised that:

1. A political subdivision of the State of Ohio may not designate itself as a community action agency.

2. A private non-profit corporation may provide by its charter to have the necessary powers to be a community action agency.

3. The designation of a private non-profit corporation as a community action agency by the board of county commissioners would not be an illegal delegation of authority under Ohio law.

## OPINION NO. 68-089

**Syllabus:**

1. A national bank or a bank organized under the laws of any state offering participations in a Commingled Trust Fund is exempt by Section 1707.02, Revised Code, from the provisions of Sections 1707.08 through 1707.11, Revised Code, if such bank is under the supervision of or subject to regulation by the government or state under whose laws it was organized.

2. A national bank or a bank organized under the laws of this state issuing participations in a Commingled Trust Fund is exempt from the registration requirement of Section 1707.15, Revised Code.

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**To: J. Gordon Peltier, Director, Department of Commerce, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, June 6, 1968**

I have before me your letter of March 15, 1968 requesting my opinion on the application of the Ohio Blue Sky Laws to the offerings of participations in a Commingled Trust Fund administered by a bank. Specifically, you have requested an answer to the following questions:

> "1) Does such offering of participations in said Commingled Trust Fund constitute a sale of securities to be regulated under Sections 1707.01 to 1707.45, inclusive, Ohio Revised Code; further does the offeror have to be licensed as a dealer in securities pursuant to Section 1707.-15, Ohio Revised Code?
>
> "2) Does this operation of a bank constitute a 'banking function' in the ordinary sense of a bank acting as a fiduciary, viz., aggressive selling of participation of mutual fund interests?
>
> "3) Does the State of Ohio have authority to regulate sale of securities by a National bank in the manner described herein?
>
> "4) Does the Division of Securities have jurisdiction of the sale of such interests when created by an Ohio chartered bank?"

In answer to the first part of your first question, Section 1701.01, Revised Code, provides that a "Security means * * *

an interest in any trust." However, Section 1707.02, Revised Code, provides:

> "(A) 'Exempt', as used in this section, means exempt from sections 1707.08 to 1707.11, inclusive, and 1707.39 of the Revised Code.
>
> "* * * * * * * * *
>
> "(C) Any security issued by and representing an interest in or an obligation of a national bank, a corporation, or a governmental agency created by or under the laws of the United States or of the Dominion of Canada, or a bank organized under the laws of any state, is exempt, if such bank, corporation, or governmental agency is under the supervision of or subject to regulation by the government or state under whose laws it was organized.
>
> "* * * * * * * * *"
>
> (Emphasis added)

Therefore, if the trustee is a national bank or a state bank subject to regulation by the government or state under whose laws it was organized it is not subject to the provisions of Sections 1707.08 to 1707.11, Revised Code. See also Section 1707.09, Revised Code.

In answer to the second part of your first question, it is my opinion that the offerer bank as an issuer of trust certificates is not subject to the registration provisions of Section 1707.15, Revised Code.

Section 1707.03, Revised Code, provides:

> "(A) As used in this section 'exempt' means that, except in the case of securities the right to buy, sell, or deal in which has been suspended or revoked under an existing order of the division of securities under Section 1707.13 of the Revised Code, transactions in securities may be carried on and completed without compliance with sections 1707.08 to 1707.11, inclusive, of the Revised Code.
>
> "* * * * * * * * *
>
> "(J) The sale of securities by a bank or credit union organized under the laws of the United States or of this state is exempt, if at a profit to such seller of not more than two per cent of the total sale price of such securities.
>
> "* * * * * * * * *"

Thus, a bank selling participations in a Commingled Trust

Fund qualifies for the exemption under subsection (J), if the profit on the sale is less than two percent of the total sale price of such securities. Since the bank in question is also the issuer of the participations, it does not receive any profit in a resale as contemplated by subsection (J).

However, subsection (J) exempts only those banks organized under the laws of this state and under the laws of the United States. Therefore, those banks which do not qualify under subsection (J) must comply with Sections 1707.14 and 1707.15, Revised Code.

Section 1707.14, Revised Code, provides:

> "(A) No person shall engage in this state in the business of acting as broker for others in the purchase or sale of securities unless such person is licensed as a dealer by the division of securities.
>
> "(B) No person shall sell securities within this state or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless such person is licensed as a dealer by the division, except in the following cases:
>
> "(1) When the securities are the subject matter of one or more transactions enumerated in divisions (B) to (L), inclusive, and (O) to (Q), inclusive, of section 1707.03 of the Revised Code;
>
> "* * * * * * * * *"

The statutory exemption of Section 1707.14, supra, relieves national banks and banks organized under the laws of this state issuing participations in a Commingled Trust Fund of the obligation of registering under Section 1707.15, supra.

In answer to your second question, one acting as a trustee is considered as acting in a fiduciary capacity. 53 O. Jur. 2d, Trustee, Section 13, page 401.

In view of the answers given to your first question, it is unnecessary to answer the third and fourth questions presented in your request. The statutory exemptions from securities regulations for certain transactions in which banks are involved have been extended for the reason that state and national banks in certain instances are subject to the control of other governmental administrative agencies. Policy considerations favor the avoidance of duplication of efforts in the administration of protective measures.

Therefore it is my opinion and you are accordingly advised that:

1. A national bank or a bank organized under the laws of any state offering participations in a Commingled Trust Fund is

exempt by Section 1707.02, Revised Code, from the provisions of Sections 1707.08 through 1707.11, Revised Code, if such bank is under the supervision of or subject to regulation by the government or state under whose laws it was organized.

2. A national bank or a bank organized under the laws of this state issuing participations in a Commingled Trust Fund is exempt from the registration requirement of Section 1707.15, Revised Code.

## OPINION NO. 68-090

**Syllabus:**

1. The clerk of a county board of education is not eligible for the increased compensation provided to "nonteaching employees" by Amended Substitute Senate Bill No. 350, effective December 1, 1967.

2. The clerk of a local, city, or exempted village board of education is a "nonteaching employee" within the terms of Amended Substitute Senate Bill No. 350 and is, therefore, entitled to the increased compensation provided therein.

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**To: Robert A. Jones, Clermont County Pros. Atty., Batavia, Ohio**
**By: William B. Saxbe, Attorney General, June 6, 1968**

Your request for my opinion reads in part as follows:

"* * * * * * * * *

"We have received several inquiries from local school districts in our county as to whether or not the Clerk of the Board of Education is included as a non teaching employee under the provisions of Section 7D of amended substitute Senate Bill No. 350."

Section 7 (D), Amended Substitute Senate Bill No. 350, effective December 1, 1967, reads as follows:

"For school years 1967-1968 and 1968-69, each city, exempted village, local, county, and joint vocational school district shall spend for increased salaries for noncertificated employees an amount equal to eighty dollars times the number of approved classroom units for the school district, in addition to payments made pursuant to the compensation plan required by division (A) of this section for such noncertificated employees. Each regular nonteaching employee shall receive an increase in compensation of ten cents per hour to a maximum of two thousand eighty hours per year, provided

that no such employee shall receive an increase of less than one hundred dollars per year. The increases in compensation made pursuant to this section may include plans established pursuant to section 3313.202 of the Revised Code. Increases in compensation authorized by this section shall not apply to employees whose wage rates are established in accordance with the procedures set forth in Chapter 4115. of the Revised Code."

The term "nonteaching employee" is defined in several sections of the Revised Code. In Section 3313.202, for the purposes of procuring group medical insurance, the definition of "nonteaching employees" is as follows:

"* * *'Nonteaching employees' as used in this section means any person employed in the public schools of the state in a position for which he is not required to have a certificate issued pursuant to sections 3319.22 to 3319.31, inclusive, of the Revised Code."

Another definition of "nonteaching employee" is found in Chapter 3309. of the Revised Code, for the purposes of the Public School Employees Retirement System. Section 3309.01, Revised Code, provides, in pertinent part, as follows:

"As used in Chapter 3309. of the Revised Code;

"(A) 'Employer' means boards of education, school districts, joint vocational districts, * * * or other agencies within the state by which an employee is employed and paid, * * *

"(B) 'Employee" means any person employed by an employer as defined in division (A) of this section in a position for which he is not required to have a certificate issued pursuant to sections 3319.22 to 3319.31, inclusive, of the Revised Code; * * *

"* * * * * * * * *"

As the above statutory definitions demonstrate, the primary requisite of a "nonteaching employee" is that he be employed by the school system in a position for which a certificate issued pursuant to Sections 3319.22 to 3319.31, inclusive, of the Revised Code, is not needed. Amended Substitute Senate Bill No. 350 recognizes this definition by the use of the term "noncertificated employees". Since the board of education is the governmental and administrative body of the school district, 48 Ohio Jurisprudence Second, Sections 58 and 59, and the clerks of the boards of education are employees of the boards, Schrock v. Board of Education of Euclid City School District, 141 Ohio St. 528, (1943), it follows that those clerks of such boards who are not required to have certificates issued pursuant to Sections 3319.22 to 3319.31, inclusive, of the Revised Code, are "noncertificated

employees" within the terms of Amended Substitute Senate Bill No. 350 and are entitled to the benefits conferred therein.

Amended Substitute Senate Bill No. 350, supra, does not confer any compensation benefits upon the clerk of a county board of education because those duties are imposed upon the county superintendent by Section 3313.22 of the Revised Code. The county superintendent is required to have a certificate by virtue of Section 3319.01 of the Revised Code.

However, the clerks of the boards of education of local, city, and exempted village school districts are not required to have a certificate issued pursuant to Section 3319.22 to Section 3319.31, inclusive, of the Revised Code, and are, therefore, within the compensation grants of Amended Substitute Senate Bill No. 350, supra.

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

1. The clerk of a county board of education is not eligible for the increased compensation provided to "nonteaching employees" by Amended Substitute Senate Bill No. 350, effective December 1, 1967.

2. The clerk of a local, city, or exempted village board of education is a "nonteaching employee" within the terms of Amended Substitute Senate Bill No. 350 and is, therefore, entitled to the increased compensation provided therein.

## OPINION NO. 68-091

**Syllabus:**

The provision of Section 709.03, Revised Code, concerning the removal of a signature of a person from an annexation petition, does not demand that the person wishing to withdraw his signature, by the filing of a written notice of withdrawal, personally appear before the clerk of the board of county commissioners to accomplish such filing.

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**To: Rex Larson, Richland County Pros. Atty., Mansfield, Ohio**
**By: William B. Saxbe, Attorney General, June 7, 1968**

I have your request for my opinion wherein you inquire whether Section 709.03, Revised Code, as effective December 1, 1967, requires personal filing with the clerk of the board of county commissioners of a written notice of withdrawal of his signature by the person requesting such withdrawal.

The entire text of Section 709.03, Revised Code, as effective December 1, 1967, reads as follows:

> "The petition required by section 709.02 of the Revised Code shall be filed in the office of the board of county commissioners and the clerk shall cause the petition to be entered upon the

record of proceedings of the board, which entry shall be the first official act of the board on the annexation petition, and shall cause the petition to be filed in the office of the county auditor, where it shall be subject to the inspection of any interested person. The agent for the petitioners shall cause written notice of the filing of the petition with the board of county commissioners and the date of such filing to be delivered to the clerk of the legislative authority of the municipal corporation to which annexation is proposed and to the clerk of each township any portion of which is included within the territory sought to be annexed. Any person who signed the petition for annexation may remove his signature by filing with the clerk of the board of county commissioners a written notice of withdrawal of his signature within twenty days after such a notice of filing is delivered to the clerk of the township in which he resides. Thereafter signatures may be withdrawn or removed only in the manner authorized by section 709.032 [709.03.2] of the Revised Code."

(New material underlined)

In order to answer your specific question, it will be necessary to review the definition of "file" and to discern the legislative intent which generated the changes in this section of the statute.

Bouvier's Law Dictionary, Baldwin's Century Edition (1946), defines "file" as follows:

> "In the sense of a statute requiring the filing of a paper or document, it is filed when it is delivered to and received by the proper officer to be kept on file."

Webster's Third New International Dictionary defines "file" as follows:

> "to deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office."

A review of these and several other dictionary definitions of the word, "file", indicates that the main meaning which is intended to be conveyed by the word is that the filing of a document is accomplished when the document is placed in the official custody of the proper officer.

It is often a practice in legal matters that persons present documents for filing by mail, by counsel or by other representative. A review of the case law concerning the filing of documents indicates that this practice is acceptable. The timeliness of the filing is usually the issue.. It is taken for granted that persons often utilize their attorneys or the mail in order to present for filing various documents which are required by law to be filed. In the case of Frank Dillon v. The Superior Court of Nevada County, 24 Cal. App. 760, 766 (1914), the court openly

commented that a person can comply with a statutory filing requirement by allowing his attorney to mail the document to the proper officer.

Thus, the gist of the legal definitions and the case law concerning filing is that a person has filed a paper when the paper is physically lodged, by some means, in the official custody of the proper officer. Given this background, the fact that the legislature used the word, "filing," in Section 709.03, Revised Code, supra, does not necessarily mean that a person wishing to withdraw his signature must personally hand his written notice to the clerk of the board of county commissioners.

In attempting to perceive the legislative intent which generated the changes in this section of the statute, it is important to note that the earlier version of the statute did not mention what rights a signer of an annexation petition had if he wanted to withdraw his signature. This silence of the earlier version of the statute led to uncertainty concerning the rights of a signer to withdraw his signature. In the case of Chadwell v. Cain, 169 Ohio St. 425, 438 (1959), the court held that in the absence of statutory provisions to the contrary, a signer of a petition for annexation of territory to a city or village has a right to withdraw his name from such petition at any time before official action has been taken thereon. By "official action", the court explained that it meant some "affirmative administrative action."

The new material in Section 709.03, Revised Code, supra, appears to be intended to clear up the uncertainty in this area concerning a signer's right to withdraw his signature. This new material makes it clear that the first official act of the board shall be the entry of the petition upon the record of proceedings of the board. In addition, this new material makes it clear that the legislature wished to allow the withdrawal of signatures from the petition if the signer acts within twenty days from the date when the clerk of the township where he resides is notified of the filing of the petition with the clerk of the board of county commissioners.

It is quite conceivable that the first official action of the board (i.e., the entry of the petition upon the record of proceedings of the board) might have already taken place when a signer, acting within the twenty-day period, withdraws his name from the petition. Thus, the legislature has allowed a possible extension of the common-law right of a signer to withdraw his name from an annexation petition by allowing such right of withdrawal to be exercised after the first official action of the board.

In any event, the main purpose of the change in this section of the statute appears to have been to make clear the time limits within which a person can easily withdraw his name from an annexation petition. As explained above, the legislature may well have liberalized the common-law right regarding such withdrawal. It is, therefore, not likely that the legislature intended to put a strained connotation on the word, "filing", by requiring the signer to walk in and personally hand his written notice to the clerk of the board of county commissioners.

Therefore, it is my opinion, and you are hereby advised that the provision of Section 709.03, Revised Code, concerning the re-

moval of a signature of a person from an annexation petition, does not demand that the person wishing to withdraw his signature, by the filing of a written notice of withdrawal, personally appear before the clerk of the board of county commissioners to accomplish such filing.

## OPINION 68-093

**Syllabus:**

The fiscal officer of a county board of mental retardation is the auditor of the county within which the county board of mental retardation is located.

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**To: David D. Dowd, Jr., Stark County Pros. Atty., Canton, Ohio**
**By: William B. Saxbe, Attorney General, June 7, 1968**

Your request for my opinion states that county boards of mental retardation, created by Amended Senate Bill No. 169, effective October 25, 1967, receive funds derived from taxes levied pursuant to division (L) of Section 5705.19, Revised Code, and are authorized to expend funds pursuant to the authority granted by Sections 5126.03 and 5126.04 of the Revised Code and you ask:

> "* * * who is to be the fiscal officer for the newly created County Board of Mental Retardation within the meaning of Sections 5126.01 -- 5126.04, inclusive, of the Revised Code of Ohio."

An examination of Sections 5126.01 through 5126.04, Revised Code, and Sections 5127.01 through 5127.04, Revised Code, which were enacted and amended, respectively, by Amended Senate Bill No. 169 (132 v S. 169), effective October 25, 1967, reveals that the legislature did not specifically designate who is to act as the fiscal officer for a county board of mental retardation.

Section 5126.03, Revised Code, provides in pertinent part:

> "The county board of mental retardation, subject to the rules, regulations, and standards of the commissioner of mental hygiene shall:
>
> " * * * * * * * * *
>
> "(B) Submit an annual report of its work and expenditures, pursuant to Section 5127.01 of the Revised Code, to the commissioner and to the board of county commissioners at the close of the fiscal year and at such other times as may be requested.
>
> " * * * * * * * * *

"The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section."

As can be seen from the above, the county board of mental retardation must submit an annual report of its work and expenditures to the board of county commissioners and the board of county commissioners must provide sufficient funds so as to enable the board of mental retardation to perform its functions and duties.

Section 5705.01, Revised Code, reads in pertinent part:

"As used in sections 5705.01 to 5705.47, inclusive, of the Revised Code:

" * * * * * * * * *

"(D) 'Fiscal officer' in the case of a county, means the county auditor; in the case of a municipal corporation, the city auditor or village clerk, or such officer as, by virtue of the charter, has the duties and functions of the city auditor or village clerk, except that in the case of a municipal university the board of directors of which have assumed, in the manner provided by law, the custody and control of the funds of the university, the chief accounting officer of the university shall perform, with respect to such funds, the duties vested in the fiscal officer of the subdivision by sections 5705.41 and 5705.44 of the Revised Code; in the case of a school district, the clerk of the board of education; in the case of a township, the township clerk; in the case of a children's home district, tuberculosis hospital district, county school district, general health district, metropolitan park district, or county library district, the county auditor of the county designated by law to act as the auditor of the district; and in all other cases, the officer responsible for keeping the appropriation accounts and drawing warrants for the expenditure of the moneys of the district or taxing unit.

" * * * * * * * * *

"(H) 'Taxing unit' means any subdivision or other governmental district having authority to levy taxes on the property in such district, or issue bonds which constitute a charge against the property of such district, including conservancy districts, metropolitan park districts, sanitary districts, road districts, and other districts.

"(I) 'District authority' means any board of directors, trustees, commissioners, or other officers controlling a district institution or activity which derives its income or funds from two or more

subdivisions, such as the county school board, the trustees of district tuberculosis hospitals and district children's homes, the district board of health, and other such boards."

Considering that a county board of mental retardation has no independent tax levying authority and is dependent upon only the subdivision (county) within which it was created for revenues, it does not fit within the above quoted definitions of "Taxing unit" or "District authority" in divisions (H) and (I) of Section 5705.01, supra. Furthermore, since the county board of mental retardation was not specifically assigned a fiscal officer either by Amended Senate Bill No. 169, supra, or by division (D) of Section 5705.01, supra, and since it is a board of the county within which it is located, the fiscal officer of which is the county auditor, it is my opinion and you are hereby advised that the fiscal officer of a county board of mental retardation is the auditor of the county within which the county board of mental retardation is located.

## OPINION NO. 68-094

**Syllabus:**

1. Section 2101.11, Revised Code, permits but does not require the board of county commissioners to approve a budget for the probate court which exceeds the amount collected in the preceeding year by that court.

2. Section 2151.10, Revised Code, imposes an absolute duty upon the board of county commissioners to appropriate an amount equal to that which is reasonably requested by a juvenile court judge, and that duty is unaffected by the availability or unavailability of unanticipated or unappropriated funds.

3. The board of county commissioners is not authorized to dictate to the juvenile court the monthly or daily amount that will be expended for the support, care and maintenance of any child under the juvenile court's control.

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**To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio**
**By: William B. Saxbe, Attorney General, June 11, 1968**

Your request for my opinion raises the following questions:

1. May the board of county commissioners approve a budget for the probate court under Section 2101.11, Revised Code, which exceeds the amount collected in the preceding calendar year by the court?

Section 2101.11, Revised Code, provides in part, as follows:

"Such appointees shall receive such compensation and expenses as the judge deter-

mines, and shall serve during the pleasure of the judge. The compensation of such appointee shall be paid in semimonthly installments by the county treasurer from the county treasury, upon the warrants of the county auditor, certified to by the judge. The board of county commissioners shall appropriate such sum of money each year as will meet all the administrative expense of the court which the judge deems necessary for the operation of the court, including the salaries of such appointees as the judge determines. The total compensation paid to the appointees in any calendar year shall not exceed the total fees earned by the court during the preceding calendar year, unless approved by the board."

The limitation in that section that the total compensation paid to appointees in any calendar year shall not exceed the amount collected during the past year is not absolute. If the limitation were absolute, the last clause of the second paragraph of Section 2101.11, supra, "unless approved by the board", would have no meaning. Therefore, if the request for compensation of appointees submitted by the probate court judge is reasonable and if it does not exceed the total fees collected by the court during the previous year, the board of county commissioners must appropriate an amount equal to such request. If the request is for an amount more than that sum collected during the previous year, the board may appropriate an amount equal to such request. It will be noted, however, that the limitation regarding the fees collected during the previous year applies only to the appropriation for the compensation to be paid to the appointees. There is no limitation on the appropriation for reasonable administrative expenses.

2. Does Section 2151.10, Revised Code, require the board of county commissioners to appropriate funds from the general fund of the county not previously anticipated or appropriated in its annual budget to meet the needs of the requested budget of the juvenile court?

Section 2151.10, Revised Code, provides:

"The board of county commissioners shall appropriate such sum of money each year as will meet all the administrative expense of the juvenile court, including reasonable expenses of the juvenile judge and such officers and employees as he may designate in attending conferences at which juvenile or welfare problems are discussed, and such sum each year as will provide for the maintenance and operation of the detention home, the care, maintenance, education, and support of neglected, dependent, and delinquent children, other than children entitled to aid under sections 5107.01 to 5107.16, inclusive, of the Revised Code, and for necessary orthopedic, surgical, and medical treatment, and special care as may be ordered by the court for any neglected, dependent, or delinquent children. All

disbursements from such appropriations shall be upon specifically itemized vouchers, certified to by the judge."

State ex rel. Moorehead v. Reed, et al., 177 Ohio St. 4 (1964), was a mandamus action brought by a juvenile court judge to compel the board of county commissioners to appropriate funds requested under the predecessor to Section 2151.10, supra. At page 6 of that case the court noted that respondent had urged that there were "no unappropriated funds out of which the additional funds could be appropriated, and that to comply with the relator's request would work an undue hardship and burden on other officers and agencies." The court held that such facts did not excuse the respondent board from fulfilling its mandatory duty. "The hardship, if any, visited upon the operation of other county officers through lack of funds resulting from the appropriation of the amounts requested by the probate judge for the operation of his offices, is a matter over which this court has no control, but is wholly within the province of the General Assembly." State ex rel. Moorehead v. Reed et al., supra, page 7.

Therefore, it is my opinion that the board of county commissioners has an absolute duty to appropriate an amount equal to a reasonable request by a juvenile court judge pursuant to Section 2151.10, supra, and that such duty is unaffected by the availability of unanticipated or unappropriated funds.

3. Can the board of county commissioners dictate to the juvenile court the monthly amount or daily amount that will be expended as to the support, care and maintenance of any child under the juvenile court's control?

In answer to your third question, I know of no provision authorizing the board of county commissioners to dictate to the juvenile court the monthly or daily amount that will be expended for the support, care and maintenance of any child under the juvenile court's control. Indeed, such action by the board would be contrary to the provisions of Section 2151.10, supra, and to my answer to your second question.

4. If the juvenile court has absolute control over expenditures relative to said children, what must the board of county commissioners do in order to provide the funds when all tax funds have been appropriated?

In view of the answer given to your second question and the holding in State ex rel. Moorehead v. Reed et al., supra, the county commissioners are clearly required to appropriate an amount equal to that requested by a juvenile court judge pursuant to Section 2151.10, supra. In the Moorehead case, supra, it was held that a writ of mandamus would issue to require the commissioners to make the requested appropriation. Therefore, the appropriation should be made pursuant to the judges request even though there are presently no unappropriated funds. The method by which funds may be made available to satisfy such appropriation is for administrative determination and any answer by me to your question would be improper and an usurpation of the commissioners function.

## OPINION NO. 68-095

**Syllabus:**

1. Section 3319.081, Revised Code, provides that all non-teaching employees of a school district who have been employed for three or more years as of November 24, 1967 are automatically granted continuing contracts.

2. Section 3319.081, Revised Code, provides that each non-teaching employee of a school be granted a continuing contract upon the completion of three years of continuous employment.

3. The requirement that non-teaching employees of a school district be granted a continuing contract upon the completion of three years of service is mandatory.

4. Section 3319.081, Revised Code, authorizes a school board to give a newly hired non-teaching employee of a school district a contract for less than one year.

5. For continuing contract purposes, a year consists of not less than one hundred twenty days of actual service between July 1 and June 30 of the succeeding calendar year.

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**To: Marshall E. Peterson, Greene County Pros. Atty., Xenia, Ohio**
**By: William B. Saxbe, Attorney General, June 11, 1968**

I have before me your request for my opinion on the following questions:

"1. Does Section 3319.081 require that all non-teaching personnel who have been working in systems for 3 or more years are automatically on continuing contracts?

"2. Does it require that they must be given a continuing contract on the anniversary of their present contract if they have been employed for 3 years or more?

"3. Is it mandatory to grant continuing contracts at the end of 3 years?

"4. Division A states employment shall be for a period of not more than one year -

"a. Does this mean you can give a contract for a lesser amount of time?

"b. If so, what length of time constitutes a year for continuing contract purposes?"

In answer to your first question I direct your attention

to Section 3319.081 (D):

> "All employees who have been employed by a school district, where the provisions of sections 143.01 to 143.08, inclusive, of the Revised Code do not apply, for a period of at least three years at the time of the effective date of this section, shall hold continuing contracts of employment pursuant to this section."

I note that this statute became effective November 24, 1967. Therefore, it is my opinion that all non-teaching employees of school districts not subject to the provisions of Section 143.01 to 143.08, inclusive of the Revised Code, that had been employed by the district for three or more years prior to November 24, 1967 are granted continuing contracts by operation of law.

Section 3319.081, supra, further provides, in part:

> "In all school districts wherein the provisions of sections 143.01 to 143.48, inclusive, of the Revised Code do not apply the following employment contract system shall control for employees whose contracts of employment are not otherwise provided by law:
>
> "(A) Newly hired regular nonteaching school employees, including regular hourly rate and per diem employees, shall enter into written contracts for their employment which shall be for a period of not more than one year. If such employees are rehired, their subsequent contract shall be for a period of two years.
>
> "(B) After the termination of the two-year contract provided in division (A) of this section, if the contract of a nonteaching employee is renewed, the employee shall be continued in employment, and the salary provided in the contract may be increased but not reduced unless such reduction is a part of a uniform plan affecting the nonteaching employees of the entire district."

This portion of the statute requires that as each nonteaching employee of a school district completes three years of employment after November 24, 1967, he shall be granted a continuing contract and this requirement is mandatory.

The statutory requirement of Section 3319.081 (A), supra, is that new employees be given a written contract for a period of not more than one year. It is my opinion that such employee may be granted a contract for less than one year.

"Year" * * * is defined by Section 3319.09, Revised Code, which states in part as follows:

> "As used in sections 3319.08 to 3319.18, inclusive, of the Revised Code:
>
> "* * * * * * * * *

"(B) 'Year' as applied to term of service means actual service of not less than one hundred twenty days within a school year; provided that any board of education may grant a leave of absence for professional advancement with full credit for service."

School year is defined by Section 3313.62, Revised Code, which reads as follows:

"The school year shall begin on the first day of July of each calendar year and close on the thirtieth day of June of the succeeding calendar year. A school week shall consist of five days, and a school month of four school weeks."

Therefore, for the purposes of Section 3319.08 (D), supra, years of service for a continuing contract means not less than one hundred twenty days of actual service between the first day of July and the thirtieth day of June of the succeeding calendar year.

Therefore, it is my opinion and you are hereby advised that:

1. Section 3319.081, Revised Code, provides that all non-teaching employees of a school district who have been employed for three or more years as of November 24, 1967 are automatically granted continuing contracts.

2. Section 3319.081, Revised Code, provides that each non-teaching employee of a school be granted a continuing contract upon the completion of three years of continuous employment.

3. The requirement that non-teaching employees of a school district be granted a continuing contract upon the completion of three years of service is mandatory.

4. Section 3319.081, Revised Code, authorizes a school board to give a newly hired non-teaching employee of a school district a contract for less than one year.

5. For continuing contract purposes, a year consists of not less than one hundred twenty days of actual service between July 1 and June 30 of the succeeding calendar year.

## OPINION NO. 68-096

**Syllabus:**

**In the event of a conflict between Sections 519.12 and 5511.01, Revised Code, any action by the board of township trustees to approve a request for a change in zoning may only be taken after the provisions of Section 5511.01, Revised Code, have been complied with.**

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To: Marshall E. Peterson, Greene County Pros. Atty., Xenia, Ohio
By: William B. Saxbe, Attorney General, June 12, 1968

Your letter requests my opinion whether a board of township trustees may approve a zoning change within 20 days of the public hearing as provided by Section 519.12, Revised Code, amended effective May 7, 1968, or must the board defer its approval for a period of 120 days when the land sought to be rezoned falls within the terms of Section 5511.01, Revised Code, amended effective November 14, 1967, which requires a zoning authority to defer approval of any change for a period of 120 days during which time the director of highways shall acquire land needed for highway purposes or notify the zoning authority that he does not wish to acquire the property.

By their terms, both sections set forth mandatory provisions with regard to the time within which a zoning authority may take action to approve an application for a zoning change. Section 519.12, Revised Code, applies generally to all lands subject to the authority of the board of township trustees, whereas Section 5511.01, Revised Code, applies only to those lands within a certain distance of a newly established center line or a highway proposed to be changed. A special statute covering a particular subject matter must be read as an exception to a statute covering the same subject in general terms. State, ex rel. Board of Education v. Schumann, Clerk, 7 Ohio St. (2d), 41 (1966).

It cannot have been the intent of the legislature to authorize a board of township trustees to act within 20 days without regard to Section 5511.01, Revised Code, but to require all other authorities to defer their action for a period of 120 days. It is more reasonable to say that the legislature intended the 120 day provision to apply to all zoning authorities and to toll the time within which these authorities may approve a change pending fulfillment of the provisions of Section 5511.01, Revised Code.

It is my opinion, therefore, and you are advised that in the event of a conflict between Sections 519.12 and 5511.01, Revised Code, any action by the board of township trustees to approve a request for a change in zoning may only be taken after the provisions of Section 5511.01, Revised Code, have been complied with.

## OPINION NO. 68-097

Syllabus:

A private physician or registered nurse may legally refuse to withdraw blood when requested by a law enforcement official acting under the provisions of Section 4511.191, supra.

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To: James H. Estill, Holmes County Pros. Atty., Millersburg, Ohio
By: William B. Saxbe, Attorney General, June 12, 1968

Your request for my opinion reads in pertinent part as follows:

> "(1) Is the withdrawal of blood for the sole purpose of testing for alcohol content the 'practice of medicine.'
>
> "(2) Can a physician or registered nurse lawfully refuse to administer such a test when a request is legally made at the direction of an officer of law.
>
> "(3) May a physician or registered nurse legally refuse to administer a test when the subject is unconscious or otherwise in a condition rendering him incapable of refusal.
>
> "(4) May a registered nurse or physician require a written consent to be given in their presence prior to the administering of the test.
>
> "(5) Would the physician or registered nurse administering the test suffer civil liability when the same is made at the lawful direction of an officer."

At the outset, it is observed that your questions pertain to the responsibilities and liabilities of physicians and registered nurses with respect to withdrawing blood at the request of a law enforcement official acting under the provisions of Sections 4511.19 and 4511.191, Revised Code. (Implied Consent Law)

Although you are presenting the questions, it would appear that answers to questions one and five would for all practical purposes constitute advice to private physicians and nurses. As you know, the powers and duties of the Attorney General are fixed by statute and as a consequence it would be inappropriate for me to render such advice.

It would appear, however, that question two is germane to the entire problem and that a resolution of this issue will be dispositive of questions three and four, and the opinion will be so confined.

Section 4511.19, Revised Code, reads in pertinent part as follows:

"When a person submits to a blood test

at the request of a police officer under section 4511.191 of the Revised Code, only a physician or a registered nurse shall withdraw blood for the purpose of determining the alcoholic content therein. This limitation does not apply to the taking of breath or urine specimens."

I do not construe Section 4511.19, supra, to mean that physicians or nurses are legally obligated to withdraw blood upon a request of a police officer. 41 American Jurisprudence, Section 4, Obligation to Practice or Accept Professional Employment, page 135, reads in pertinent part as follows:

"In the absence of statute, a physician or surgeon is under no legal obligation to render professional services to everyone who applies to him or seeks to engage him. Physicians are not public servants who are bound to serve all who seek them, as are innkeepers, common carriers, and the like. And the existence of a license law and the possession of a license does not enlarge a physician's duty in regard to accepting an offered patient. An act requiring a license before a person practices medicine is essentially a preventive not a compulsory measure, and one who has secured a license according to statute is under no obligation to take all the cases that offer, and therefore is not liable for damages alleged to result from the refusal to take a case. * * *"

I am unaware of any Ohio statute placing a physician or registered nurse under a legal obligation to withdraw blood under the circumstances being discussed herein.

I am of the opinion that the operation of the Ohio Implied Consent Law as it applies to the withdrawal of blood depends upon the voluntary cooperation of the medical profession.

If individual physicians or nurses do not desire to participate in the program that is their decision to make and it would follow that if there is no legal obligation on the part of private physicians and nurses to withdraw blood, it is within their perogative to establish limitations for the withdrawing of blood; e.g., that the person be conscious and give written consent in their presence for the withdrawal of the blood.

If, in your geographical area, satisfactory arrangements can not be made for the withdrawing of blood by physicians or registered nurses, there appears to be no alternative but to

have law enforcement officials direct that breath or urine tests be given. The two hour limitation for withdrawing of bodily substance, (see Section 4511.191, supra) would preclude the use of physicians or nurses residing a great distance from point of arrest. I realize that at times the chemical test may have to be forfeited as to a person who is unconscious or otherwise incapable of taking the breath or urine test.

In conclusion, it is my opinion that a private physician or registered nurse may legally refuse to withdraw blood when requested by a law enforcement official acting under the provisions of Section 4511.191, supra.

## OPINION NO. 68-098

**Syllabus:**

1. Section 2949,19, Revised Code, requires that the State of Ohio must bear the costs as provided in Section 2953.03, Revised Code, and counsel fees as provided in Section 2941.51, Revised Code, of an indigent defendant on appeal whether or not he has been committed prior to his appeal.

2. Section 2941.51 (C), Revised Code, requires the State of Ohio to pay as costs, in addition to the counsel fees received for representation at the trial as provided in Section 2941.51 (B), Revised Code, any counsel fees up to three-hundred dollars resulting from an appeal as approved by the court of appeals.

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**To: Roger Cloud, Auditor of State, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, June 12, 1968**

I have received your request for my opinion which states, in essence, as follows:

1. When a defendant is convicted of a felony, but not committed to a penal institution, and the auditor of state did not receive a cost bill pursuant to Section 2949.19, Revised Code, for the original trial, how are the costs and counsel fees to be paid if the defendant subsequently prevails on appeal? How shall the costs be paid if the defendant loses?

2. When an indigent defendant convicted of a felony has been committed to a penal institution, and subsequently loses an appeal shall the costs and counsel fees of the appeal be considered part of the original costs?

3. If counsel fees were paid in accordance with Section 2941.51 (B), Revised Code, is the state obligated to pay counsel fees again when presented with an additional cost bill for costs and counsel fees in case of appeal?

Your first question must be answered by considering the

interrelation of several statutes of the Revised Code, particularly in light of a recent Ohio Supreme Court decision, State ex rel. Clifford v. Cloud, 7 Ohio St. 2d 55.

Section 2949.19, Revised Code, provides:

"Upon the return of the writ against a convict issued under section 2949.15 of the Revised Code, if an amount of money has not been made sufficient for the payment of costs of conviction and no additional property is found whereon to levy, the clerk of the court of common pleas shall so certify to the auditor of state, under the seal of the court, with a statement of the total amount of costs, the amount paid, and the amount remaining unpaid. Only one statement of costs shall be certified to the auditor of state in each case, and such statement of costs shall include all of the counts contained in a single indictment and payment requested for one count only and no additional costs shall be allowed where there are additional counts contained in the same indictment. Such unpaid amount as the auditor of state finds to be correct shall be paid by the state to the order of such clerk."

(Emphasis added)

Section 2949.20, Revised Code, provides:

"In any case of final judgment of reversal as provided in section 2953.07 of the Revised Code, whenever the state of Ohio is defendant on appeal, the clerk of the court of common pleas of the county in which sentence was imposed shall certify to the audito of state the amount of all costs incurred by the plaintiff in error to secure such reversal, including the costs of bills of exception and transcripts as certified by the clerk. The auditor of state shall audit such cost bill and issue his warrant on the treasurer of state, payable to the order of the plaintiff in error, for such amount as the auditor of state finds to be correct."

Section 2941.51, Revised Code, provides:

"Counsel assigned in a case of felony under section 2941.50 of the Revised Code shall be paid for their services by the county, and shall receive therefor:

"(A) In a case of murder in the first or second degree, and manslaughter in the first and second degree, such compensation and expenses as the trial court may approve;

"(B) In other cases of felony, such compensation as the trial court may approve, not exceeding three hundred dollars and expenses as the trial court may approve;

"(C) In a case where counsel have been assigned to conduct an appeal under section 2941.50 of the Revised Code, such compensation shall be fixed by the court of appeals or the supreme court as provided in divisions (A) and (B) of this section.

"The fee and expenses approved by the court under this section shall be taxed as part of the costs.

"The county auditor shall draw his order on the county treasurer for the payment of such counsel in the amount fixed by the court, plus expenses as the court may fix, and certified by the court to the auditor."

(Emphasis added)

Section 2953.03, Revised Code, provides in part:

"The judge of the trial court in a felony case may, because of the poverty of the defendant, in the interest of justice, order the bill of exceptions and transcript, or either paid from the county treasury in the manner provided in section 2301.24 of the Revised Code, and order the amount in money so paid charged as costs in the case. In cases where the court grants a motion to prepare a bill of exceptions for the defendant at the expense of the state, as provided in this section, and there is not sufficient time to file it, as provided by section 2945.65 of the Revised Code, the court shall extend such time not exceeding thirty days from granting such motion."

(Emphasis added)

Section 2949.20, Revised Code, makes it obligatory upon the state to bear the costs of transcripts and bills of exception in all criminal cases where the original defendant initiates and prevails upon such appeal. This would be without regard to whether or not the defendant was indigent. If defendant were an indigent, counsel fees and other costs would be taxed as costs to the state pursuant to Section 2941.51, supra, and Section 2953.03, supra, respectively. Authority for the proposition that Section 2949.19, supra, requires that such costs will finally be borne by the state is found in the syllabus of State ex rel. Clifford v. Cloud, supra, at page 55:

"The Auditor of State is required upon certification to him of the statement of costs of a criminal conviction pursuant to Section 2949.19, Revised Code, to pay an amount equal to the moneys expended for fees and expenses of court-appointed counsel, approved and taxed as a part of the costs under Section 2941.51, Revised Code, provided there are sufficient funds in the state treasury appropriated for that purpose."

A similar rationale would also require that the costs of an in-

digent's appeal be taxed as costs to the state, after the money is originally paid from the county treasury as provided in Section 2301.24, Revised Code. The result that these costs would be reimbursable by the state to the county was reached in dictum State ex rel. Clifford, supra, at page 57:

> "* * * * * * * * *
>
> "If respondent's argument is extended to its logical conclusion, not only would juror fees not be reimbursable by the state, but neither would such items as transcripts of evidence (Section 2301.24, Revised Code, 'paid from the county treasury, and taxed and collected as costs'), * * *. We are firmly of the opinion that that result was never intended by the General Assembly."

The fact that an indigent defendant would win or lose his appeal would have no significance in light of the above Ohio Supreme Court decision. Also the liability of the state for such costs is not altered by the fact that a convicted defendant is placed on probation (or given suspended sentence), Opinion Nos. 285 and 820, Opinions of the Attorney General for 1959. Thus, in response to your first question, a defendant, who initiates an appeal and subsequently prevails upon it will be reimbursed by the state for costs of appeal. In the case of appeal of an indigent defendant, however, the state will bear the costs of appeal and counsel fees, whether the indigent defendant prevails or not on appeal. Whether or not the defendant has been committed to a penal institution prior to appeal has no bearing upon the state's burden of being taxed for costs and counsel fees on appeal. Also the fact that a cost bill had not been received by the auditor of the state for the original trial would not prevent the costs of appeal from being considered costs of the original bill.

Your second question is disposed of by the above discussion since the costs and counsel fees of an indigent having been committed to a penal institution and then appealing are original costs as provided for by Section 2949.19, supra.

Your third question can be answered by reference to Section 2941.51 (C), supra. This section vests the court of appeals with the power to fix compensation of counsel on appeal in the manner provided in the two preceeding paragraphs by the trial court. The next paragraph of that section provides that all the fees of such section shall be taxed, as costs. Although a three-hundred dollar limitation on compensation to counsel in counsel in Section 2941.51 (B), supra, mentions only the trial court, an interpretation of the two provisions together would require that an additional amount be granted to counsel on appeal with a three-hundred dollar maximum limitation.

Therefore, it is my opinion and you are advised that:

1. Section 2949.19, Revised Code, requires that the State of Ohio must bear the costs as provided in Section 2953.03, Revised Code, and counsel fees as provided in Section 2941.51,

Revised Code, of an indigent defendant on appeal whether or not he has been committed prior to his appeal.

2. Section 2941.51 (C), Revised Code, requires the State of Ohio to pay as costs, in addition to the counsel fees received for representation at the trial as provided in Section 2941.51 (B), Revised Code, any counsel fees up to three-hundred dollars resulting from an appeal as approved by the court of appeals.

## OPINION NO. 68-099

**Syllabus:**

1. The board of county commissioners may provide the clerk of the Common Pleas Court with branch offices in villages within the county while retaining the main office in the county seat, such branch offices to be for the auto title division.

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**To: Robert A. Jones, Clermont County Pros. Atty., Batavia, Ohio**
**By: William B. Saxbe, Attorney General, June 13, 1968**

I have before me your request for my opinion which asks the following question:

> "Can the Clerk of the Common Pleas Court have branch offices in villages within the county while retaining the main office in the County Seat, said offices to be for the auto title division?"

Your request includes correspondence with the Clerk of Common Pleas Court for Clermont County who expressed the desire to set up these "branch offices" for the convenience of the public and to increase office space which has become limited due to filing needs. He also stated that the "branch offices" could be provided and maintained at no additional expense to Clermont County.

Chapter 2303, Revised Code, which is the principal source of authority for the clerk of the court of common pleas, has no provision upon which the contemplated action could be founded. As you pointed out, Section 1901.101 (F) (1), Revised Code, is the only authority which allows the establishment of one or more branch offices of the clerk. This section is limited to the administration of county courts and in no manner suggests that the clerk of the court of common pleas may act upon its authority.

Section 307.01, Revised Code, grants to the board of county commissioners the responsibility to provide offices for county officers when in its discretion they are needed. This section has been construed by former attorneys general to give implied

authority to the county commissioners to rent or lease space outside the courthouse for county officers if there is not sufficient space available in the courthouse. Opinion No. 2408, Opinions of the Attorney General for 1930, Vol. II, page 1544 at page 1545 and Opinion No. 4163, Opinions of the Attorney General for 1935, Vol. I, page 433. Since the clerk of the common pleas court is a county officer, State ex rel. Young v. Cox, 90 Ohio St. 219, office space will be provided for him as need dictates, the decision being made by the board of county commissioners.

While the location for additional offices of the county auditor and county treasurer has been restricted by statute to the county seat, Sections 319.03 and 321.05, Revised Code, it is significant that no such statute has been enacted restricting the office of the clerk of the common pleas court to this location. In the absence of a statute specifying the location for additional offices, the authority to determine this location rests solely with the board of county commissioners. Opinion No. 963, Opinions of the Attorney General for 1959, page 653; Opinion No. 65-91, Opinions of the Attorney General for 1965, page 199. Their decision is guided primarily by considerations of operating efficiency. As I stated in Opinion No. 65-91, Opinions of the Attorney General for 1965, at page 200, when presented with the question of whether the prosecuting attorney could be provided with branch offices:

> "Accordingly, I am of the opinion that a board of county commissioners may provide the prosecuting attorney with an office and such branch offices as they deem are needed."

Since your request expressed the desire to set up these branch offices for the convenience of the public and to increase office space which has become limited due to filing needs, I am of the opinion that the board of county commissioners has the authority under these circumstances to provide branch offices for the clerk of the Common Pleas Court in villages within the county while retaining the main office in the county seat, said offices to be for the auto title division.

Therefore, it is my opinion and you are accordingly advised that the board of county commissioners may provide the clerk of the Common Pleas Court with branch offices in villages within the county while retaining the main office in the county seat, such branch offices to be for the auto title division.

## OPINION NO. 68-100

**Syllabus:**

1. A local school district transferred to an adjoining county school district pursuant to Section 3311.231, Revised Code, may not be transferred as and remain an independent local school district but must be annexed to an existing local, city or exempted village school district.

2. There is no provision in Section 3311.231, Revised Code, for a referendum on the question of the choice of the school district to which such territory shall be annexed.

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**To: Harry A. Sargeant, Jr., Sandusky County Pros. Atty., Fremont, Ohio**
**By: William B. Saxbe, Attorney General, June 13, 1968**

I have before me your request for my opinion on the following questions:

> "For purposes of this letter, please assume that by either a vote of the taxpayers, or by resolution of the County Board of Education which has not been objected to by referendum, it is proposed that a local school district in County A be transferred to County B.
>
> "If the Board of Education of County B accepts the transfer, (1) may it permit the transferred local school district to remain as an independent local school district rather than being annexed to an existing local, exempted village or city school district in County B, do the taxpayers in the transferred local school district in County A have a right of referendum on the question of the choice of the school district in County B to which they are annexed?"

The applicable protion of Section 3311.231, Revised Code, states:

> "A county board of education may propose, by resolution adopted by majority vote of its full membership, or qualified electors of the area affected equal in number to not less than fifty-five percent of the qualified electors voting at the last general election residing within that portion of a local district proposed to be transferred may propose, by petition, <u>the transfer of a part or all of one or more local school districts within the county to an adjoining county school district or to an adjoining city or exempted village school district</u>." (Emphasis added)

A county school district is defined by Section 3311.05, Revised Code, as being:

> "The territory within the territorial limits of a county, exclusive of the territory embraced in any city school district, exempted village school district, and excluding the territory detached therefrom for school purposes and including the territory attached thereto for school purposes constitutes a 'county school district.'"

Thus a county school district is divided into local school districts, which for some purposes are under the control of the county board of education. Transfer of territory to an adjoining county school district is covered by Section 3311.231, Revised Code, which provides, in part:

> "Where a county board of education adopts a resolution accepting territory transferred to the county school district under the provisions of section 3311.24 of the Revised Code, the county board shall, at the time of the adoption of the resolution accepting the territory, designate the school district to which the accepted territory shall be annexed."

This section of the statute provides that the transferred territory be annexed to an existing school district. There is no statutory authority for the transferred territory to remain an independent local school district. Since the county board of education only has authority over local school districts, the transferred territory would be annexed to a local school district by the accepting of a county board of education.

I note that once the transfer to an adjoining county school district has been completed, an independent local school district could be created under the provisions of Section 3311.26, Revised Code.

Upon transfer of a local school district to an adjoining city or exempted village school district, the territory transferred would become part of the city or exempted village school district under the provisions of Section 3311.231, supra. The accepting county board of education has no authority to annex the territory transferred to an existing exempted village or city school district.

In answer to your second question I note that Section 3311.231, supra, provides in part:

> "* * * * * * * * *
>
> "Where a transfer of territory is proposed by a county board of education under the provisions of this section the county board shall, at its next regular meeting that occurs not earlier than the thirtieth day after the adoption by the county board of the resolution proposing such transfer, adopt a resolution making the transfer as originally proposed unless, prior to the expiration of such thirty-day period, quali-

fied electors residing in the area proposed to be transferred, equal in number to a majority of the qualified electors voting at the last general election, file a petition of referendum against such transfer."

If the transfer is initiated by petition, such petition will indicate to which adjoining city, exempted village or county school district such territory will be annexed and is not subject to referendum against such transfer, since the electors will vote on the transfer.

If the transfer is initiated by the county board of education, the electors may file a petition of referendum against such transfer to an adjoining city, exempted village or county school district. But the statute does not provide for the right of referendum on the question of the choice of school districts to which the territory will be annexed. The referendum would be on the question whether or not to become annexed to a certain city, village or county school district.

Upon the completion of a transfer to an adjoining county school district the electors of the transferred territory have no voice, either by initiating petition or negative referendum as to which local school district the territory will be annexed. This determination is completely in the hands of the accepting county board of education.

Therefore, it is my opinion and you are hereby advised that:

1. A local school district transferred to an adjoining county school district pursuant to Section 3311.231, Revised Code, may not be transferred as and remain an independent local school district but must be annexed to an existing local, city or exempted village school district.

2. There is no provision in Section 3311.231, Revised Code, for a referendum on the question of the choice of the school district to which such territory shall be annexed.

## OPINION NO. 68-102

**Syllabus:**

Pursuant to Section 3905.01, Revised Code, the Superintendent of Insurance may deny an application for, or revoke an agent's license, other than life, if the applicant or licensee is a domestic corporation whose stock is owned by nonresidents who are engaged in the business of insurance as agents or brokers.

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**To: Eugene P. Brown, Director, Dept. of Insurance, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, June 18, 1968**

Before me is your request for my opinion which reads in pertinent part as follows:

> "May the Superintendent of Insurance deny an application for, or revoke an agent's license, other than life, if the applicant or licensee is a domestic corporation whose stock is owned by non-residents who are engaged in the business of insurance as agents or brokers?"

Before answering your question it appears necessary to clarify Opinion No. 66-025, Opinions of the Attorney General for 1966, to which you refer in your letter. In that opinion the first question was "May the holder of a foreign broker's license own stock in an Ohio corporate insurance agency?" This question was answered essentially by stating that such acquisition was permissible but might result in the revocation of the foreign broker's license. This conclusion was based on the foreign insurance broker's licensing statute, Section 3905.03, Revised Code, which prohibits a license from being issued to a person who has an interest in an Ohio licensed agent or agency. In addition, the opinion stated that "There is no prohibition of a holder of a foreign broker's license acquiring stock in an Ohio corporate insurance agency, nor do I find any provision of the Code which would disqualify such licensee from such acquisition." The opinion did not pass on the question now presented and was primarily limited to an interpretation of Section 3905.03, Revised Code.

The present question is addressed to the power of the superintendent of Insurance to refuse to issue or revoke an Ohio resident agent's license (Section 3905.01, Revised Code), of a domestic corporation whose stock is owned by nonresident insurance agents or brokers.

As noted in your request letter, Section 3905.01, Revised Code, does not specifically authorize the issuance of resident agents' licenses to corporations. However, as you know, it has been the long-standing administrative practice to issue such licenses to domestic corporations under certain circumstances, and previous opinions of this office have approved this practice. (See Opinion No. 3711, Opinions of the Attorney General for 1922, page 909, Opinion No. 44, Opinions of the Attorney General for 1927, page 55, and Opinion No. 5078, Opinions of the Attorney General for 1936, page 19.)

The opinions cited are all pertinent to the question posed in that they all deal with the use and abuse of resident agents' and foreign brokers' licenses. They should be considered in connection with this opinion because in varying degree they all support the conclusion reached herein.

Under Ohio law it is clear that your question must be answered in the affirmative. The leading case is The State ex rel. Johnson & Higgins Co. v. Safford, Supt., 117 Ohio St., 576 (1927). This case was an original action in mandamus in the Supreme Court of Ohio seeking writs to compel the Superintendent of Insurance to issue licenses to two Ohio agency corporations. The Superintendent had refused to issue licenses on the ground that a majority of the stock of the agency corporations was owned by foreign corporations engaged in the insurance brokerage business in other states.

The licenses sought were resident agents' licenses pursuant to Section 644, General Code, which was re-enacted as Section 3905.01, Revised Code, with amendments not pertinent here.

The court sustained a demurrer to the petition stating in the syllabus as follows:

> "1. In the furtherance of justice, the fiction of a corporate entity may be disregarded where the corporation is so controlled and its affairs so conducted as to make it merely an instrumentality for the purpose of evading and circumventing a state law.
>
> "2. Where a statute forbids the issuing of an insurance agent's license unless the applicant be a resident of the state, and the superintendent of insurance, pursuant to administrative precedent and in the exercise of a sound discretion, has denied a license to a domestic insurance corporation, the majority of whose capital stock is owned by the holder of a foreign insurance broker's license, upon the ground that the fiction of the domestic corporate entity is sought to be used as a means of circumventing the statute by such holder of a foreign insurance broker's license, a writ of mandamus seeking to compel the superintendent of insurance to issue such license will be denied."

In the Safford opinion at page 580 the legal proposition was stated as follows:

> "To state the proposition somewhat differently, may a domestic corporation, organized for the purpose of soliciting insurance other than life, incorporated under the laws of this state, be denied a license to do business in this state merely because the bulk of its stock is owned by a foreign corporation engaged in the insurance brokerage business, which latter corporation is not enabled to secure a license to act in this state by reason of Section 644, General Code?"

In determining that a license could be denied on such ground, the opinion, after discussing the principle of disregarding the corporate entity, states at page 582:

> "The principle of denying the right to do by indirection what cannot be done by direct method is thus clearly recognized. If a nonresident insurance company cannot write insurance in Ohio without a resident license, how can this desired result be acquired by coming into the state in the guise of an owner of a controlling interest in a domestic corporation, thus seeking to circumvent the statute relative to resident licenses?"

Further, the Court acknowledged that administrative interpretations of given laws, if long continued, will be recognized and followed by the Courts. The Court noted that Sections 644,

644-1, and 644-2, General Code (presently Sections 3905.01, 3905.02 and 3905.03, Revised Code, with minor amendments) had been interpreted by the Department of Insurance and such interpretation was adopted by the Court as follows at page 582:

> "Sections 644, 644-1, and 644-2, General Code, prior to the amendment of March 14, 1927 (112 Ohio Laws, p. 92), have received interpretation of the insurance department of this state; and, under facts so similar as to make the situation almost parallel to the instant case, a license was refused to a holder of a foreign broker's license where such license was sought by a corporation of Ohio dominated by the holder of such foreign broker's license. We think the interpretation then placed upon the statutes was correct and that the same interpretation should now prevail, in spite of the amendment of Section 644-2."

The Court concludes on page 583 as follows:

> "It is our conclusion that the relator company is but the alter ego of a nonresident insurance broker corporation desiring to write insurance in Ohio, but unable to obtain a resident license, and that the course pursued by it is but an attempt to do by indirection that which cannot be accomplished by direct and legal methods. Entertaining this view, the demurrer of the respondent to the petition of the relator is sustained."

The principle of Safford, supra, was found applicable in State ex rel Federal Union Ins. Co. v. Warner, Supt. of Ins., 128 Ohio St., 261 (1934), in which a resident agent's license was refused to a natural resident of this state who had entered into a partnership with nonresident agents and brokers.

I have examined the legislative history of General Code Sections 644, 644-1 and 644-2 (Sections 3905.01, 3905.02 and 3905.03, Revised Code, respectively) and the cases which have considered these sections. There are no amendments or cases which would suggest a result or interpretation different from the Safford and Warner decisions. On the contrary, it appears that the administrative interpretation has been followed for an additional forty-one years since Safford.

The cases are clear that the Superintendent has discretion to grant or deny a license. In the exercise thereof pursuant to Section 3905.01, Revised Code, the Superintendent of Insurance may deny an application for, or revoke an agent's license, other than life, if the applicant or licensee is a domestic corporation whose stock is owned by nonresidents who are engaged in the business of insurance as agents or brokers.

## OPINION NO. 68-103

**Syllabus:**

(1) A board of education is not required to give a teaching position to a teacher with a continuing contract who holds an 8-year professional agriculture certificate when vocational agriculture is removed from the school curriculum.

(2) A local board of education is not required to create an administrative position for a teacher with a continuing contract who has a 4-year executive head (local superintendent) certificate.

(3) Upon the creation of a joint vocational school district, a local member school board of the district may provide transportation for the pupils of its local district to and from the joint vocational school, providing such transportation could be made available after considerations of facilities and distance as presented in Section 3327.01, Revised Code, and the standards adopted by the State Board of Education.

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**To: William H. Weaver, Williams County Pros. Atty., Bryan, Ohio**
**By: William B. Saxbe, Attorney General, June 21, 1968**

Your request for my opinion reads as follows:

"One of the School Boards in the Williams County System presently has a vocational agriculture instructor who holds an 8-year professional teachers certificate and a 4-year executive head certificate and holds a continuing teaching contract with said Board of Education, The School Board is contemplating dropping vocational agriculture from their curriculum for the 1968-1969 school year.

"Question 1. Assuming the vocational agriculture is discontinued by said School Board, then is the School Board of Education required to give said vocational agriculture teacher a teaching assignment in some other area, and what is the responsibility of the School Board as to dismissing a teacher (for example, in the science area) to be replaced by the vocational agriculture teacher who holds a continuing contract?

"Question 2. Is the School Board required to create an administrative position for the vocational agriculture teacher, since he holds a continuing contract?

"Question 3. At the present time a Joint Vocational School is under construction. The

voters of Williams County and three other counties have approved a tax levy for the construction of said Joint Vocational School and the operating expenses of said School. If said School Board discontinues their Vocational Agriculture course, then what is the responsibility of said School Board as to furnishing transportation to those students who would still desire to continue with their Vocational Agriculture Course at the Joint Vocational School?"

In answer to your first question, Section 3319.22 (I), Revised Code, provides that a professional teacher's certificate shall be valid for teaching the subject "as named in such certificate " - in this case, vocational agriculture. It would follow that if vocational agriculture were discontinued, the local board of education would not be required to give the teacher a new teaching assignment because his certificate is valid only to teach that subject named in his certificate.

Your second question concerns a type of teaching certificate formerly called executive head, but recently changed in name to local superintendent pursuant to Section 3319.22 (L), Revised Code. This certificate is valid for teaching the subjects named in the certificate, and for supervision and administration in the local school district. Pursuant to Section 3319.02, Revised Code, which gives the local board discretion in appointing local superintendents, the local board would not be required to give this teacher an administrative position, even if one were in existence and available.

Your final question regards a local school board's responsibility to transport pupils from its district to a joint vocational school. A joint vocational school is inherently a cooperative venture on the part of several school districts. This is illustrated by the substance of Sections 3311.16, et seq., Revised Code, particularly Section 3311.18, Revised Code, which provides in part that the respective school districts may share on a proportional basis the "administrative, clerical, and other expenses necessary to the establishment and operation of a joint vocational school district until funds are otherwise provided." This would enable the school districts to provide transportation for their pupils to the vocational school. The joint vocational school district may assume the transportation responsibility as permitted by Section 3327.01, Revised Code, which provides, in part:

> "In determining the necessity for transportation, availability of facilities and distance to the school shall be considered."
> (Emphasis added)

Thus, the local board of education may transport these vocational agriculture students as permitted by Section 3327.01, supra, and the standards adopted by the State Board of Education.

Therefore, it is my opinion and you are advised that:

(1) A board of education is not required to give a teaching position to a teacher with a continuing contract who holds

an 8-year professional agriculture certificate when vocational agriculture is removed from the school curriculum.

(2) A local board of education is not required to create an administrative position for a teacher with a continuing contract who has a 4-year executive head (local superintendent) certificate.

(3) Upon the creation of a joint vocational school district, a local member school board of the district may provide transportation for the pupils of its local district to and from the joint vocational school, providing such transportation could be made available after considerations of facilities and distance as presented in Section 3327.01, Revised Code, and the standards adopted by the State Board of Education.

## OPINION NO. 68-105

**Syllabus:**

The county board of education is not a "county office" within the meaning of Section 307.84, Revised Code, and is, therefore, free to make contracts for data processing service notwithstanding the establishment of a county data processing board which governs "county office" data processing contracts.

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**To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio**
**By: William B. Saxbe, Attorney General, June 25, 1968**

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

> "May a county board of education contract for the use of any automatic data processing equipment without the prior approval of the County Data Processing Board?"

In your request you mention that the Board of County Commissioners of Cuyahoga County did create the Cuyahoga County Data Processing Board pursuant to Sections 307.84 to 307.846, Revised Code, and that since the establishment of the Board, the County Board of Education has contracted for data processing service without the approval of the newly created board.

The applicable code section is 307.84, Revised Code, and it reads as follows:

> "The board of county commissioners of any county may, by resolution, establish a county automatic data processing board. The board shall consist of the county treasurer or his representative, a member or representative of the board of county commissioners chosen by the board, and the county auditor or his representative who shall serve as secretary.

"After the initial meeting of the county automatic data processing board, no county office shall purchase, lease, operate, or contract for the use of any automatic data processing equipment without prior approval of the board.

"As used in sections 307.84 to 307.846 [307.84.6], inclusive, of the Revised Code, 'county office' means any officer, department, board, commission, agency, court or other office of the county."

The obvious question is whether a county board of education is a "county office" within the meaning of Section 307.84, supra. Traditionally, county boards of education have been considered a separate entity apart from county government. When speaking about county school boards, the Supreme Court of Ohio in Cline v. Martin, 94 Ohio St. 420, stated in part at page 426:

"Such boards are agencies of the state for the organization, administration and control of the public school system of the state, separate and apart from the usual political and governmental functions of other subdivisions of the state. The fact that certain officers of other subdivisions may be delegated some duties or authority in relation thereto does not change the status or destroy the separate identity of the school district."

Also in Opinion No. 1145, Opinions of the Attorney General for 1957, page 522, it is stated at page 524:

"* * * It is recognized that a school district is a governmental unit separate and distinct from a governmental unit such as a county, township, city, or village, * * *."

Therefore, since a county board of education is only responsible to the state board of education and the county commissioners have no control over the activities of the county board of education, it is not a "county office" within the meaning of Section 307.84, supra.

In conclusion, it is my opinion and you are hereby advised that the county board of education is not a "county office" within the meaning of Section 307.84, Revised Code, and is, therefore, free to make contracts for data processing service notwithstanding the establishment of a county data processing board which governs "county office" data processing contracts.

## OPINION NO. 68-109

**Syllabus:**

A serviceman on an overnight or weekend pass is included within the exemptions set forth in Section 4507.03, Revised Code, which exempts certain persons from the Driver's License Law, Sections 4507.01 to 4507.39, inclusive, of the Revised Code.

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**To: Fred Rice, Registrar, Bureau of Motor Vehicles, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, July 5, 1968**

I have before me your request for my opinion on the following question, which I will paraphrase:

Is a serviceman who is on an overnight or weekend pass included within the exemptions set forth in Section 4507.03 of the Revised Code, and thus expressly exempt from Sections 4507.01 to 4507.39, Revised Code, inclusive?

From reading the pertinent legislation and discerning the intent of the legislature in passing it, the purpose of the law is to benefit servicemen who find it impossible or inconvenient to renew their Ohio driver's licenses while on active duty. To exempt servicemen while only on leave or furlough would seem to defeat the basic intent of the legislature in providing benefits to our men in uniform. The distinction between a weekend pass and a leave or furlough, for the purpose of Section 4507.03, supra, is not significant.

Therefore, it is my opinion that a serviceman on an overnight or weekend pass is included within the exemptions set forth in Section 4507.03, Revised Code, which exempts certain persons from the Driver's License Law, Sections 4507.01 to 4507.39, inclusive, of the Revised Code.

## OPINION NO. 68-110

**Syllabus:**

A judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968, for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected.

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**To: Ted W. Brown, Secretary of State, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, July 5, 1968**

I have before me your request for my opinion wherein you inquire whether a judge who is currently holding office and who would be otherwise eligible for re-election, is disqualified from running for re-election in November, 1968, by the passage of Amended Substitute House Joint Resolution No. 42 at the special election held May 7, 1968, if he will have attained the age of seventy years by the time he would assume the office for such term to which he was re-elected.

There was submitted to the electors of Ohio on May 7, 1968, Amended Substitute House Joint Resolution No. 42 which included a proposal to enact Section 6 of Article IV of the Ohio Constitution and a "Schedule" which contained a limited exception from the operation of Section 6 of Article IV, supra, for certain judges.

Section 6 (C) of Article IV of the Ohio Constitution proposed by Amended Substitute House Joint Resolution No. 42 provides, in part:

> "(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. * * *"

The amendment proposed by Amended Substitute House Joint Resolution No. 42 received a majority of the votes of the electors voting on the question.

Section 1 of Article XVI of the Ohio Constitution provides, in part:

> "* * * Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. * * *"

The Ohio Supreme Court, in Euclid v. Heaton, Case No. 41178, 15 Ohio St. (2d), 65, decided June 19, 1968, held that Section 1 of Article XVI, supra, and its earlier case State, ex rel. McNamara v. Campbell, 94 Ohio St., 403, required that an amendment of Section 2, Article II to the Constitution proposed by the General Assembly pursuant to the authority of Section 1 of Article XVI, supra, became effective on May 7, 1968, the date upon which it received the votes of a majority of the electors voting on the question in the special election in which it was submitted.

The first paragraph of the syllabus in the case of State, ex rel. McNamara v. Campbell, 94 Ohio St., 403, reads:

> "A provision in a joint resolution of the General Assembly of Ohio, submitting to the electors of the state a proposed amendment to the Constitution, that the same shall not go into effect until a time later than that fixed

> by Section 1 of Article XVI of the Constitution, is inoperative and void, unless the proposition to postpone the taking effect of such proposed amendment beyond the time named in the Constitution is also submitted to the electors of the state and adopted by a majority of those voting on the proposition."

The proposal to amend Section 2 of Article IV, supra, was submitted in the same proposed constitutional amendment as the proposal to enact Section 6 of Article IV.

I can determine no difference in the method of submitting the amendment of Section 2 of Article IV and the enactment of Section 6 of Article IV to the electors. Consequently, I am constrained to conclude that Section 6 (C) of Article IV became effective upon its passage on May 7, 1968.

Section (E) of the "Schedule" of Amended Substitute House Joint Resolution No. 42 provides:

> "(E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Section 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court."

This language was included in the text of the amendment published as required by Section 1 of Article XVI of the Ohio Constitution "once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published."

Although Section 1 of Article XVI as interpreted in State, ex rel. McNamara v. Campbell, supra, required the Court to conclude in Euclid v. Heaton, supra, that the establishment of an effective date at a date later than that fixed by Section 1 of Article XVI, was "inoperative and void, unless the proposition to postpone the taking effect * * * is also submitted to the electors of the state and adopted by a majority of those voting on the proposition," I find nothing in the laws or Constitution of Ohio nor in the McNamara case, supra, which would require that all language of a proposed amendment appear on the ballot that is submitted to the electors, in order to be operative and valid. To the contrary, Section 3505.06, Revised Code, provides, in part:

> "The questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or amendment shall be used as prepared and certified by the secretary of state for state-wide questions or issues or by the board for local questions or issues. If such condensed text is used, the full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in

each polling place in some spot that is easily accessible to the voters."

Pursuant to the foregoing authority, the Secretary of State condensed the text of Amended Substitute House Joint Resolution No. 42. The pertinent language of the condensed text of the ballot submitted to the electors was:

> "* * * to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years * * *"

Pursuant to the requirement of Section 3505.06, supra, the full text of the proposed amendment was posted in each polling place. This requirement of Section 3505.06, supra, and the requirement that the full text be published for five consecutive weeks, was considered by the Ohio Supreme Court in State, ex rel. Foreman v. Brown, 10 Ohio St. (2d), 139 (1967). In the Court's opinion by Mr. Chief Justice Taft, there is quoted at page 149 from an earlier case the following language:

> "'* * * the possibility of misunderstanding seems remote especially when it is remembered that the full text of the amendment was published in at least one newspaper in each county once a week for five consecutive weeks preceding the election, and that the full text was duly posted in every polling place. Of course a greater degree of accuracy of expression would have resulted if the ballot had contained the lengthy involved technical terms of the entire amendment, but this is the very difficulty sought to be avoided by the statute which expressly states that the "ballot need not contain the full text of the proposal" and that a "condensed text" may be substituted therefor. * * *'"

The foregoing language is equally applicable to the condensation of Amended Substitute House Joint Resolution No. 42 prepared by the Secretary of State.

Recognizing that the full text of the amendment proposed by Amended Substitute House Joint Resolution No. 42, including the Schedule, was published for five consecutive weeks preceding the election as required by the Constitution and the full text was posted at each polling place as required by Section 3505.06, supra, I conclude that the condensation "properly described" and included the "Schedule" and that the "Schedule" became effective immediately upon passage.

Accordingly, an anomalous situation exists: A constitutional provision is effective, which specifically makes ineligible for re-election at the election in November, 1968, a judge currently holding office who will have attained the age of seventy years by the time he will assume office for such term, while exempting from its provisions judges who are holding office on December 31, 1969, and who would be otherwise eligible for re-election in 1970 for a term beginning in 1971, by permitting such judges to be re-elected for one additional term. I recognize that the reason for this anomoly was the intention of the General Assembly that

the constitutional amendment proposed by Amended Substitute House Joint Resolution No. 42 was not to be effective until January 10, 1970, and the necessarily incidental intention that it was not to apply to judges running for re-election in 1968.

You do not ask about the eligibility of a candidate for election to judicial office at the election in November, 1968, who will attain the age of seventy years who is not running for re-election either because he was appointed to the judicial office or because he is not an incumbent and, therefore, I express no opinion on the validity of such candidacy.

The "Equal Protection" clause, Section 1 of Article XIV of the United States Constitution provides, in part, that:

> "* * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

The United States Supreme Court has interpreted this requirement to guarantee that "all persons shall be treated alike under like circumstances and conditions." Yick Wo v. Hopkins, 118 U.S., 356. The Equal Protection clause prohibits the Ohio Constitution from disqualifying some judges from running for re-election who have attained the age of seventy years while permitting others of the same age to run for re-election without some reasonable basis for making the distinction.

There is nothing inherent in holding judicial office on December 31, 1969, which would reasonably justify allowing such judge who would be seventy before he assumed office to run for re-election for one additional term while denying to a judge who holds judicial office after May 4, 1968, but before December 31, 1969, the same right to run for re-election if he would be seventy before he assumed office for the term to which he was re-elected.

Consequently, either Division (E) of the Schedule is invalid because it is an unreasonable preference of some judges or Section 6 (C) of Article IV is invalid because it works an unreasonable disqualification of similarly situated judges. It is clear that the people of Ohio could provide in the Ohio Constitution that no one who has attained the age of seventy years is eligible to run for judicial office. It is equally clear that there is no requirement that the Ohio Constitution have any limitation as to age of judicial candidates for re-election.

Given this choice of inherently permissible alternatives, I must be guided by the intention of the General Assembly of Ohio in proposing to the electors of Ohio, Amended Substitute House Joint Resolution No. 42 and the intention of the majority of the electors of Ohio in adopting it. It is clear from a reading of the exception contained in Division (E) of the "Schedule," supra, and the effective date of January 10, 1970, of the Resolution that the General Assembly intended that any person holding judicial office who attained the age of seventy years on or before December 31, 1969, would be eligible for re-election to one term. In consideration of the fact that the full text was published once a week for five consecutive weeks prior to the election and a copy of the full text was posted at each polling place I conclude that those electors voting for the proposal intended that the incumbent judges on or before December 31, 1969, would be eligible for re-election.

The "Effective Date and Repeal" division of Amended Substitute House Joint Resolution No. 42 provides, in part:

> "If adopted by a majority of the electors voting on this amendment, the amendment except paragraph (B) of the Schedule shall take effect January 10, 1970, * * *"

Inasmuch as it is not constitutionally permissible to conclude that a judge who holds judicial office on or after May 4, 1968, but prior to December 31, 1969, may not run for re-election if he would attain the age of seventy years before he would assume office for the term to which he was re-elected while concluding that a judge who holds office on December 31, 1969, is eligible to run for re-election even though he would attain the age of seventy years before assuming office, I do conclude that the disqualification of judges running for re-election contained in Section 6 (C) of Article IV is not effective until January 1, 1970.

Accordingly, it is my opinion and you are advised that a judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968, for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected.

## OPINION NO. 68-111

**Syllabus:**

1. The board of trustees of a regional airport authority may not contract with a corporation to operate the airport if a member of the board of trustees owns stock in the corporation.

2. Section 308.04, Revised Code, prohibits a member of a board of trustees of a regional airport authority from having an interest in a contract of the regional airport authority and a provision that a contract with the regional airport authority should be let only after competitive bidding does not affect the prohibition of that section.

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**To: Marshall E. Peterson, Greene County Pros. Atty., Xenia, Ohio**
**By: William B. Saxbe, Attorney General, July 9, 1968**

Your opinion request raises the following questions:

> (1) May the board of trustees of a regional airport authority contract with a corporation to operate the airport if a member of the board of trustees owns stock in the corporation?
>
> (2) Would the answer to question number one be affected if the contract were let only after competitive bidding?

Section 308.04, Revised Code, provides in part:

> "Each member of the board of trustees, before entering upon his official duties, shall take and subscribe to an oath or affirmation that he will honestly, faithfully, and impartially perform the duties of his office, and that he will not be interested directly or indirectly in any contract let by the regional airport authority."
>
> (Emphasis added)

There have been no decisions construing Section 308.04, supra; however, the phrase "interested in a contract" has been used in other sections of the code. The construction given to that phrase in other sections of the code is relevant to the construction that should be given it as used in Section 308.04, supra. A member of a board of trustees who owns stock in a corporation contracting with that board of trustees is interested in a contract within the meaning of Section 308.04, supra. Opinion No. 474, Opinions of the Attorney General for 1917, Vol. II, page 1293 and Opinion No. 51, Opinions of the Attorney General for 1959, page 29.

> "* * * * * * * * *
>
> "* * * To permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state, county, or municipality of which they are officers, might encourage favoritism, and fraudulent combinations and practices, not easily detected, and thus make such officers, charged with the duty of protecting those whose interests are confided to them, instruments of harm. The surest means of preventing this, was to prohibit all such contracts; and the legislature having employed language sufficiently clear and comprehensive for this purpose, there is no authority in the courts under the pretext of construction to render nugatory the positive provisions of the statute. * * *
>
> "* * * * * * * * *"

Doll v. The State, 45 Ohio St. 445, 449 (1887).

Section 305.27, Revised Code, prohibits county commissioners from being interested in contracts of the county. The second paragraph of that section provides that the section does not apply where a commissioner, being a shareholder of a corporation but not an officer or director, owns not in excess of five per cent of the stock of such corporation and the value of the stock so owned does not exceed five hundred dollars. This statutory exemption is an implicit recognition by the General Assembly that ownership of stock in a corporation by a county commissioner is sufficient to constitute an interest by that commissioner in the contracts of that corporation. There is no analogous exemption in Section 308.04, supra.

In answer to your second question I refer you to Opinion No. 51, Opinions of the Attorney General for 1959, page 29. At page 32 of that opinion a question similar to yours, but relevant to another section of the code was asked. In that opinion one of my predecessors in office indicated the relevance of the exempting provision of Section 2919.09, Revised Code, which permits a public official to have an interest in a contract where the contract is let on a public bid basis. Since no such exemption was found in the section under consideration in that opinion (Section 2919.09, Revised Code), it was held that the letting of contracts on public bids did not relieve officers from legal liability and the contract from invalidity.

There is no provision in Section 308.04, supra, exempting those who have an interest in a contract from the operation of the second paragraph of that section where a contract is let on a competitive bid basis.

Therefore, it is my opinion and you are accordingly advised that:

1. The board of trustees of a regional airport authority may not contract with a corporation to operate the airport if a member of the board of trustees owns stock in the corporation.

2. Section 308.04, Revised Code, prohibits a member of a board of trustees of a regional airport authority from having an interest in a contract of the regional airport authority and a provision that a contract with the regional airport authority should be let only after competitive bidding does not affect the prohibition of that section.

## OPINION NO. 68-112

**Syllabus:**

A special deputy sheriff, who is employed on a salary basis for approximately two days per week, may not act as a professional bondsman in criminal cases, because of a possible conflict between his public duties and his private pecuniary interests.

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**To: Everett Burton, Scioto County Pros. Atty., Portsmouth, Ohio**
**By: William B. Saxbe, Attorney General, July 9, 1968**

I have before me your request for my opinion on the following question:

> "May a special deputy sheriff, who is employed on a salary basis for approximately two days per week, also act as a professional bondsman in criminal cases?"

Section 311.04, Revised Code, empowers the county sheriff to appoint such deputies as he may need to aid in the proper discharge of the functions of his office. The position of "special deputy sheriff" is nowhere defined in the Code as such, but it is established that the sheriff may appoint individuals to carry

out whatever duties he may see fit to assign them, for whatever length of time he deems such employment necessary, and such persons may be designated "special deputy sheriffs." State ex rel Geyer v. Griffin, 80 Ohio App. 447 (1946). The rights, powers and duties of a "special deputy" can be no greater than those of a regular deputy, but such rights, powers and duties can be reduced by the appointing sheriff. Opinion No. 65-177, Opinions of the Attorney General for 1965. The sheriff may delegate such of the duties of his office as he pleases to his deputies. Section 3.06, Revised Code.

The sheriff has certain statutorily defined powers and duties with regard to bail and recognizance.

Section 311.07, Revised Code, states, in part as follows:

> "Each sheriff shall preserve the public peace and cause all persons guilty of any breach of the peace, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the Court of Common Pleas, and the sheriff shall commit such persons to jail in case they refuse to do so."

Section 2937.23, Revised Code, discusses the amount of bail and the persons by whom bail may be fixed in cases of felony and misdemeanor. The pertinent portion of Section 2937.23, relating to bail in cases of misdemeanor, reads as follows:

> "* * * in cases of misdemeanor or ordinance offense it may be fixed by judge, magistrate or clerk of the court and may be in accordance with schedule previously fixed by judge or magistrate, or, in cases when the judge, magistrate or clerk of the court is not readily available, bail may be fixed by the sheriff, deputy sheriff, marshall, deputy marshall, police officer or jailer having custody of the person charged, shall be in accordance with a schedule previously fixed by the judge or magistrate, and shall be taken only in the county courthouse, or in the municipal or township building, or in the county or municipal jail. In all cases it shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearance at the trial of the case." (Emphasis supplied)

Thus, under the provisions of Section 2937.23, Revised Code, sheriffs or deputy sheriffs charged with the execution of a warrant issued on an indictment for a misdemeanor during the vacation of the court from which the warrant issued, as well as during the term time of the court, if it is not in actual session, have the power to fix bail.

It is evident a situation could occur wherein a deputy's duty in fixing the amount of bail would be in conflict with his personal pecuniary interest in setting the maximum amount. In such a situation it is possible that it would be difficult for the deputy to properly weigh the defendant's past criminal record

and probability of appearance at trial, as opposed to the profit he would enjoy as surety on a bond.

There is no specific statutory prohibition which would prevent a sheriff or his deputies from engaging in private employment. It has been held by this office that a county officer may engage in other employment, either public or private, where its nature is such that no subordination of the public office to the other employment would result, and where the outside employment would not act as a check upon the public office, and where no contrariety or antagonism between employments would result which would interfere with the duties of the public officer. Opinion No. 6776, Opinions of the Attorney General for 1956. The agent of the county officer, of course, is subject to the same standards of conduct as his principal, the officer himself. Geyer v. Griffin, supra; Section 3.06, supra.

The possibility that the private employment of a public officer or employee might interfere with the proper discharge of his public duties must invalidate such dual employment.

It is therefore my opinion, and you are hereby advised, that a special deputy sheriff, who is employed on a salary basis for approximately two days per week, may not act as a professional bondsman in criminal cases, because of a possible conflict between his public duties and his private pecuniary interests.

## OPINION NO. 68-113

**Syllabus:**

When the president of a county board of education resigns, the vice-president automatically becomes president for the remainder of the term of such office, the board appoints a new member to the board and the board elects one of its members vice-president for the remainder of the term of such office.

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**To: John L. Beckley, Vinton County Pros. Atty., McArthur, Ohio**
**By: William B. Saxbe, Attorney General, July 16, 1968**

I have before me your request for my opinion on the following questions:

> "When the Vice President of the County Board of Education assumes the duties of the President does the board elect another member of the board Vice President or,
>
> "Since the President of the board of education is an officer within the meaning of the statutes which provide for his election, and he continues in office until his successor is elected and qualified does the person selected to fill the vacancy of a resigned board president assume the

office of President when he qualifies as a new member of the board for the unexpired term pursuant to 3313.11 O.R.C."

The requirement that a county board elect a president and vice-president is contained in Section 3313.14, Revised Code, which provides:

"The board of each county school district shall hold its first meeting in January of each year, and shall organize by electing one of its members president and another vice-president, both of whom shall serve for one year."

As stated by one of my predecessors in Opinion No. 314, Opinions of the Attorney General for 1933, Syllabus 2:

"Upon the resignation of the president of a board of education, the duly elected vice-president becomes president."

Therefore, at that time there were two distinct vacancies, one vacancy being on the board of education and one vacancy being in the office of vice-president.

A vacancy on a board of education is filled pursuant to Section 3313.11, Revised Code, which states:

"A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district, or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, not earlier than 10 days after such vacancy occurs. A majority vote of all the remaining members of the board may fill any such vacancy for unexpired term."

I note that the members of a board of education are elected by the people and then the members elect a president and vice-president. In the instant case the vice-president was elected by the people as a member of the board and not as vice-president. Consequently, the same rationale should apply to appointments to fill a vacancy. The person appointed is appointed to fill a

vacancy on the board and not a vacancy in the office of vice-president.

Since the office of vice-president is created by statute, a vacancy during term should be filled by electing a new vice-president.

Therefore, it is my opinion and you are hereby advised that when the president of a county board of education resigns, the vice-president automatically becomes president for the remainder of the term of such office, the board appoints a new member to the board and the board elects one of its members vice-president for the remainder of the term of such office.

## OPINION NO. 68-115

**Syllabus:**

1. Pursuant to Section 5731.53, Revised Code, pertaining to the distribution of inheritance taxes, the political subdivisions are entitled, upon settlement, to fifty percent of the gross amount of the taxes levied and paid without any deduction for the compensation of the agent of the Tax Commissioner.

2. Pursuant to Section 5731.48, Revised Code, effective July 1, 1968, pertaining to the distribution of estate taxes, the political subdivisions are entitled, upon settlement, to fifty percent of the gross amount of the taxes levied and paid without any deduction for the compensation of the agent of the Tax Commissioner.

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**To: Roger Cloud, Auditor of State, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, July 18, 1968**

I have before me your request for my opinion wherein you state that a review of the inheritance tax settlement sheets submitted to your office by the several counties reveals that the compensation of the agents for the Tax Commissioner are, in the case of some of the counties, being deducted from the gross amount of the inheritance taxes levied and collected and that of the remaining portion, fifty percent is then returned to the political subdivision in which the tax originated, and wherein you pose the following question:

> "In view of the different methods being employed in the several counties, your opinion is

respectfully requested as to whether a municipality or township at the February 1968 settlement was entitled to receive fifty percent of the gross amount of taxes levied and paid under Chapter 5731. of the Revised Code, or fifty percent of the gross amount of taxes levied and paid under Chapter 5731. of the Revised Code, remaining after the deduction of the compensation of the agent of the tax commissioner. A further question is whether your answer to the above question would be the same for the settlement of such taxes after June 30, 1968."

Inasmuch as your question involves the inheritance tax settlement for February, 1968, and also future inheritance tax and estate tax settlements for subsequent periods, I will consider first the February, 1968, settlement.

Prior to the enactment of the Ohio Estate Tax Law, Amended Substitute Senate Bill No. 326 (132 v S 326), Section 5731.43, Revised Code, provided in pertinent part:

> "To enforce section 5731.42 of the Revised Code, the tax commissioner may appoint agents * * * Such agents shall, as compensation, receive annually * * * which shall be paid in equal monthly installments from the state's share of the undivided inheritance tax in the county treasury * * *"

Pursuant to Section 3 of Amended Substitute Senate Bill No. 326, supra, Section 5731.43, supra, was repealed effective November 30, 1967, and Section 5731.41, Revised Code, was enacted effective December 1, 1967. Said Section 5731.41, Revised Code, now reads in pertinent part:

> "To enforce section 5731.39 of the Revised Code, the tax commissioner may appoint agents * * * Such agents shall, as compensation, receive annually * * * which shall be paid in equal monthly installments from the undivided inheritance or estate tax in the county treasury * * *"

The deletion of the phrase "from the state's share of" from newly enacted Section 5731.41, supra, as will be demonstrated, does not alter the distribution of the inheritance tax in the February, 1968, settlement.

Section 7 of Article XII of the Ohio Constitution authorizes the passage of laws for the taxation of inheritances and Section 9 of Article XII of the Ohio Constitution states:

> "Not less than fifty per centum of the income and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income or inheritance tax originates, or to any of the same, as may be provided by law."
> (Emphasis added)

Pursuant to the authority of Section 7, supra, and subject to the limitation of Section 9, supra, the legislature enacted Section 5731.53, Revised Code, which will remain effective for all inheritance taxes levied upon successions to property resulting from a death which occurs on or before June 30, 1968 (see Section 3 of Amended Substitute Senate Bill No. 326, supra). Section 5731.53, supra, reads in pertinent part:

> "Fifty per cent of the gross amount of taxes levied and paid under sections 5731.01 to 5731.56, inclusive, of the Revised Code, shall be for the use of the municipal corporation or township in which the tax originates, and shall be credited as follows:
>
> "* * * * * * * * *
>
> "The remainder of such taxes, after deducting the fees and costs charged against the proceeds thereof under sections 5731.01 to 5731.56, inclusive, of the Revised Code, shall be for the use of the state, and shall be paid into the state treasury to the credit of the general revenue fund."
>
> (Emphasis added)

In Opinion No. 2819, Opinions of the Attorney General for 1958, page 591, I had occasion to consider the question of charging the compensation of the state examiners of the Bureau of Inspection and Supervision of Public Offices to the county's share of the undivided inheritance tax fund in light of Section 5731.53, supra, and I there observed, on page 595:

> "* * * The question then arises, how can the compensation and expenses of the examiner be paid without charging the fund distributable to the municipalities and townships with a share of such cost, and deducting it from the fifty percent of the tax to which they are entitled under the provision of the statute last above quoted? But Section 5731.53, supra, plainly requires payment of 'fifty per cent of the gross amount of taxes levied and paid.' 'Gross amount' according to Webster, means 'the entire earnings, receipts, or the like, without any deduction.'
>
> "Our Supreme Court, in the case of Light Company v. Evatt, 140 Ohio St., 85, had occasion to consider the meaning of the words 'gross receipts,' in a statute relating to an excise tax on receipts of public utilities. It was held as shown by the second branch of the syllabus:
>
> > "'2. The term "gross receipts" as employed in Section 5475, General Code, embraces all receipts of a public utility regardless of the form of ownership and without exclusion or deduction of payments by those owning an interest in such utility for service furnished them.'"

The syllabus of Opinion No. 2819, supra, states:

> "The compensation and expenses of state examiners of the bureau of inspection and supervision of public offices, in connection with the inspection of the proceeds of the inheritance tax levied pursuant to Section 5731.-01 et seq., Revised Code, are to be paid by the state, and may not be charged to the portion of the proceeds of such tax distributable to municipal corporations and townships under the provisions of Section 5731.53, Revised Code."

There is no conflict between Section 5731.41, supra, as it now reads and Section 5731.53, supra; the former statute specifies the amount of the agent's compensation and that said compensation be paid out of inheritance tax revenues rather than from other sources such as the Tax Commissioner's appropriation, the county auditor's appropriation or the county probate court appropriation while the latter statute, Section 5731.53, supra, specifies and controls the issue of the distribution of the taxes. Hence, in regard to the February, 1968, settlements, the subdivisions are entitled, pursuant to Section 5731.53, supra, to fifty percent of the gross amount of the inheritance taxes levied without any deduction for the compensation of the agent of the Tax Commissioner.

In regard to inheritance and estate tax settlements subsequent to February, 1968, it must be observed that inheritance tax collections will continue, probably for several years hence, to be made in respect to successions to estates of persons whose deaths occurred prior to July 1, 1968; that there is no statutory authority for maintaining two separate county death tax funds; and that newly enacted Section 5731.48, Revised Code, effective July 1, 1968, which is the distribution provision for the estate taxes, again reads:

> "Fifty percent of the gross amount of taxes levied and paid under Chapter 5731. of the Revised Code, shall be for the use of the municipal corporation or township in which the tax originates * * *"
>
> (Emphasis added)

Therefore, considering the interpretation that Section 5731.41, supra, relates to the revenue or source against which the agent's compensation is to be charged while Section 5731.53, supra, and newly enacted Section 5731.48, supra, relate to the distributions of the taxes levied, considering that both taxes will be in the process of collection for the next several years, and finally considering the desirability of a uniform method of accounting for the agents' compensation when said agents are performing duties respecting both taxes, I must therefore conclude that the subdivisions are entitled, upon settlements made after February, 1968, pursuant to Section 5731.53, supra (inheritance tax), and newly enacted Section 5731.48, supra (estate taxes), to fifty percent of the gross amount of the taxes levied without any deduction for the compensation of the agent of the Tax Commissioner.

Therefore, it is my opinion and you are hereby advised that:

1. Pursuant to Section 5731.53, Revised Code, pertaining

to the distribution of inheritance taxes, the political subdivisions are entitled, upon settlement, to fifty percent of the gross amount of the taxes levied and paid without any deduction for the compensation of the agent of the Tax Commissioner.

2. Pursuant to Section 5731.48, Revised Code, effective July 1, 1968, pertaining to the distribution of estate taxes, the political subdivisions are entitled, upon settlement, to fifty percent of the gross amount of the taxes levied and paid without any deduction for the compensation of the agent of the Tax Commissioner.

## OPINION NO. 68-117

**Syllabus:**

1. It is the duty of the solicitor or village attorney to prosecute violators of the village ordinances when village police file the charge or affidavit.

2. It is the duty of the solicitor or village attorney to prosecute violators of state laws occurring within the municipal corporation when the city or village police, sheriff or State Highway Patrol file the charge or affidavit.

3. It is the duty of the solicitor or village attorney to prosecute for the violation of a village ordinance if any other county or state official files charges or an affidavit for a violation of such ordinance.

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**To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio**
**By: William B. Saxbe, Attorney General, July 22, 1968**

I have before me your letter of recent date wherein you pose several questions concerning the obligations of the City Solicitor of Tiffin, Ohio, in prosecuting criminal matters arising within separate villages in the jurisdiction of the Tiffin Municipal Court. It is my understanding that the villages in question are incorporated municipalities located within the jurisdiction of the Tiffin Municipal Court. You ask the following five questions concerning the obligations of the City Solicitor or Assistant City Solicitor of Tiffin, Ohio.

Is he obligated to:

(1) Prosecute violation of village ordinances where village police file the charge?

(2) Prosecute violations of state laws where village police file the charge?

(3) Prosecute violations of state laws where county sheriff's department or State Highway Patrol file the charge?

(4) Prosecute violations of Village Ordinances where County or State officials file the charge?

(5) Or is the Village Solicitor responsible for the municipal court prosecution in any or all of one through four?

Section 1901.34 of the Revised Code states in part the following:

> "The city solicitor, city attorney, or director of law for each municipal corporation within the territory shall prosecute all criminal cases brought before the municipal court for violations of the ordinance of the municipal corporation for which he is solicitor, attorney, or director of law or for violation of state statutes or other criminal offenses occurring within the municipal corporation for which he is a solicitor, attorney, or director of law."
> (Emphasis added)

In consideration of the fact that the villages in question are incorporated municipalities, Section 1901.34, supra, is applicable to the questions presented. Pursuant to this section of the Code the city solicitor is directed to prosecute all criminal cases brought before the municipal court for violations of ordinances of the municipal corporation, as well as violation of state statutes or other criminal offenses occurring within the municipal corporation for which he is city solicitor.

Therefore, since there is a solicitor acting for and on behalf of the six villages in question, such solicitor is required to act as the attorney for his designated municipal corporation. The statute is not permissive nor is it indefinite or uncertain in its terms but rather it is mandatory, and the legislature used the word "shall" rather than "may" or other words of less force and direction.

Ohio Revised Code Section 2938.13 supports my foregoing conclusion:

> "In any case prosecuted for violation of a municipal ordinance the solicitor or law director, and for a statute, he or the prosecuting attorney, shall present the case for municipality and state respectively, but either may delegate such responsibility to some other attorney in a proper case, or, if the defendant be unrepresented by counsel may with leave of court, withdraw from the case. But the magistrate or judge shall not permit prosecution of any criminal case by private attorney employed or retained by a complaining witness."

My conclusion is that Sections 1908.34 and 2938.13, supra, make it the duty of each city solicitor, city attorney, or director of law of a city or village to prosecute all violations of his city or village ordinances. Also, it is his

duty to prosecute all criminal cases arising in his incorporated municipal area wherein there is a violation of state statutes.

Inasmuch as the two applicable statutes do not mention or differentiate in any instance as to the person or public authority filing the charge or affidavit, I conclude that the city solicitor of his city or village shall perform his duties as stated herein regardless of the person, persons, or police authority filing the charge. Whether the charge is filed by the village police for a violation of a village ordinance or state law makes no difference. Likewise, it is my conclusion that in instances where the county sheriff's department or the Ohio State Highway Patrol file the charges or affidavit for violation of state laws, the city solicitor must perform his function as stated in the statutes recited herein.

Accordingly, it is my opinion and you are advised:

1. It is the duty of the solicitor or village attorney to prosecute violators of the village ordinances when village police file the charge or affidavit.

2. It is the duty of the solicitor or village attorney to prosecute violators of state laws occurring within the municipal corporation when the city or village police, sheriff or State Highway Patrol file the charge or affidavit.

3. It is the duty of the solicitor or village attorney to prosecute for the violation of a village ordinance if any other county or state official files charges or an affidavit for a violation of such ordinance.

## OPINION NO. 68-120

**Syllabus:**

All teachers including substitute teachers must be employed pursuant to the provisions of Section 3319.08, Revised Code.

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**To: Ray L. Lillywhite, Executive Director, The State Teachers Retirement System, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, August 8, 1968**

Your recent request for my opinion reads as follows:

"Eligibility for membership in and contributions to the State Teachers Retirement System of Ohio are determined in part by the definition of 'teacher' in Section 3307.01 of the Ohio Revised Code. The pertinent portion reads as follows:

"'(B) "Teacher" means any person paid from public funds and employed in the public schools of the state under any type of contract described in section 3319.08 of the Revised Code in a position for which he is required to have a certificate issued pursuant

to sections 3319.22 to 3319.31, inclusive, of the Revised Code;...'

"Will you please advise us on the following question relative to the interpretation of Section 3319.08 of the Revised Code and its application to employment of substitute teachers, except those excluded by Section 3307.381 (A) of the Revised Code:

"Do the statutes require that all teachers including substitute teachers in the school districts of Ohio be employed under a contract described in Section 3319.08 of the Revised Code?"

Your question, upon review, becomes twofold: whether all teachers including substitute teachers are and must be employed pursuant to the provisions of Section 3319.08, Revised Code; what actions constitute compliance with the provisions of Section 3319.08, Revised Code.

Section 3319.08, Revised Code, reads in pertinent part as follows:

"The board of education of each city, exempted village, and local school district shall enter into written contracts for the employment and reemployment of all teachers and shall fix their salaries which may be increased but not diminished during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code.

"If a board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not avoid such employment contract."

The answer to the first part of your question is found in the statement in the first paragraph above-quoted that this statutory section pertains to "the employment and reemployment of all teachers* * *." Section 3307.381 (A), Revised Code, to which you referred, provides for the part-time employment of retired teachers and is the only exception which I find to the above statement. Thus, except for those excluded by Section 3307.381 (A), supra, all teachers including substitute teachers must be hired pursuant to the provisions of Section 3319.08, supra.

Written contracts for the employment of all teachers are prescribed in the first paragraph of Section 3319.08, supra, but, as the second paragraph of that statute makes clear, the failure of the parties to execute a written contract will not avoid an employment agreement between the board of education and the teacher. After the board of education adopts a motion or resolution to employ a teacher and the teacher accepts that employment, an employment contract between the parties is in effect, the requirements of Section 3319.08, supra, have been met, and the failure to execute a written contract shall not avoid the employment contract.

Therefore, it is my opinion and you are hereby advised that all teachers including substitute teachers must be employed pursuant to the provisions of Section 3319.08, Revised Code.

## OPINION NO. 68-123

**Syllabus:**

1. The Juvenile Court is now a part of a division of the Common Pleas Court and subject to the requirement that it provide a court reporter for its proceedings if so requested.

2. The Juvenile Court is a court of record.

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**To: Robert H. Huffer, Pickaway County Pros. Atty., Circleville, Ohio**
**By: William B. Saxbe, Attorney General, August 14, 1968**

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

> "Is the Juvenile Court required by law to provide a court reporter, or some suitable method of taking a record or is it up to counsel for any of the parties litigant to make arrangements for the taking of a record and hence pay for it, to be repaid out of court costs?
>
> "Also, is the Juvenile Court and for that matter, the Probate Court a court of record?"

The following provisions of Ohio law are the applicable authority to your request. The first of these provisions is Section 2151.07, Revised Code, which provides, in pertinent part:

> "The juvenile court, or the court of common pleas, division of domestic relations, of any county, separately and independently created, established, and functioning as such, has and shall exercise the powers and jurisdiction conferred in sections 2151.01 to 2151.55, inclusive, and section 2151.99 of the Revised Code. Except in counties in which there now is or may hereafter be created, a separate and independent juvenile court or court of domestic relations, there is hereby established within the probate court a juvenile court, presided over by the probate judge, which shall be a court of record and exercise the powers and jurisdiction of such a court."

Section 2301.20, Revised Code, reads:

> "Upon the trial of a case in the

> court of common pleas, if either party to the suit, or his attorney, requests the services of a shorthand reporter the trial judge shall grant the request or such judge may order a full report of the testimony or other proceedings, in which case such shorthand reporter shall take accurate shorthand notes of the oral testimony or other oral proceedings, which notes shall be filed in the office of the official shorthand reporter and carefully preserved."

Your request stated that the juvenile court of Pickaway County is established within the Probate Court. Section (4) (C) of Article IV of the Ohio Constitution as amended provides that on its effective date the Probate Court became a division of the Court of Common Pleas. Considering these provisions together, it is clear that where the Juvenile Court had been established within the Probate Court, it became a division of the Common Pleas Court along with the Probate Court. Inasmuch as the Juvenile Court is a part of a division of the Common Pleas Court it is subject to the procedural requirements of that Court. Section 2301.20, Revised Code, provides a requirement that a Common Pleas Court provide a court reporter if so requested by one of the parties to the litigation. Consequently, a Juvenile Court now is also so required.

As for the second question, Section 2151.07, supra, specifically provides that a Juvenile Court is a court of record.

Therefore, it is my opinion and you are hereby advised that:

1. The Juvenile Court is now a part of a division of the Common Pleas Court and subject to the requirement that it provide a court reporter for its proceedings if so requested.

2. The Juvenile Court is a court of record.

## OPINION NO. 68-124

**Syllabus:**

A regional water district created pursuant to Chapter 6119, Revised Code, is without authority to expend public funds to conduct an educational campaign, the ultimate goal of which is to insure passage of an issue to finance by general obligation bonds, the construction of a water system to serve water to citizens of the water district.

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**To: James V. Barbuto, Summit County Pros. Atty., Akron, Ohio**
**By: William B. Saxbe, Attorney General, August 15, 1968**

I have before me your request for my opinion which states:

> "May a regional Water District created pursuant to Chapter 6119 of the Revised Code of Ohio expend public funds to carry out a campaign of education, the ultimate aim of which is the passage of an issue to finance by general obligation bonds, the construction of a water system to serve water to the citizens of the water district?"

In reviewing the several opinions of the Attorney General which you have cited, it is apparent that without specific statutory authority, spending public funds to carry out a campaign by the regional water district would not be lawful. Those opinions have held that if no express authority is given for a governmental entity to spend public funds, then the question of or attempted expenditure should be resolved against the expenditure and for the interests of the taxpayers.

The question here remains, "Is a local water district a governmental, i.e., public office or a semi-public entity such as a regulated utility?" A close scrutiny of the entire chapter on Regional Water and Sewer Districts (Chap. 6119, Revised Code) indicates that the legislature intended these organizations to be considered as public offices. Section 6119.38, for example, subjects the districts to examination by the Bureau of Inspection of Public Offices. Section 6119.39, Revised Code, states that employees of the local water and sewer district are to be considered public employees. The aforementioned statutes indicate an intent by the legislature to include the water and sewer districts within the category of a public office. Such a manifest intent on the part of the legislature to include water and sewer districts within the meaning of a public office precludes the possibility that they should be considered public utilities such as Ohio Power or other such regulated public utilities. The water and sewer districts, unlike the regulated public utilities, operate on public funds which must be raised through the ballot box. If viewed in this perspective, it would be incongruous to consider regional water and sewer districts synonymous with a regulated public utility, which is basically a private enterprise function.

Previous opinions of the Attorney General have restated the need for proper statutory authorization before a public office may spend public funds for any purpose. These opinions state clearly the need for specific statutory authority. We search in vain for such authority.

Opinion No. 1245, Opinions of the Attorney General for 1937, states the position of this office. It reads:

> "There is no question but that a reasonable expenditure of public funds to advertise the necessity of a tax levy in certain cases would be perhaps a proper and in some instances a laudable purpose, but, as has been stated by this office, it is a lawful rather than a laudable purpose that justifies the expenditure of the taxpayers' money. The remedy in the in-

stant case is obviously with the legislature."

Therefore, it is my opinion and you are so advised that a regional water district created pursuant to Chapter 6119, Revised Code, is without authority to expend public funds to conduct an educational campaign, the ultimate goal of which is to insure passage of an issue to finance by general obligation bonds, the construction of a water system to serve water to citizens of the water district.

## OPINION NO. 68-126

**Syllabus:**

1. The amendments contained in Amended Substitute House Joint Resolution No. 42 repeal Title XXI of the Revised Code only to the extent that any provision thereof is inconsistent with the constitutional amendments proposed in said resolution.

2. The amendments contained in Amended Substitute House Joint Resolution No. 42 do not affect Section 2101.11, Revised Code, and the judge of the probate division of the common pleas court is still the clerk of his own court as prescribed in said section.

3. The words "clerks" and "deputies", as used in subsection (C), Section 4, Amended Substitute House Joint Resolution No. 42, refer to persons employed in such capacities in the probate division of the court of common pleas.

4. No provision of any amendment proposed in Amended Substitute House Joint Resolution No. 42 requires the assumption, by the clerk of the court of common pleas, of any duties, functions or responsibilities over the operations of the probate division of the court of common pleas.

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**To: C. Howard Johnson, Franklin County Pros. Atty., Columbus, Ohio**
**By: William B. Saxbe, Attorney General, August 22, 1968**

You request my opinion on the following questions in light of the fact that the constitutional amendments proposed in Amended Substitute House Joint Resolution No. 42, have been declared effective as of May 7, 1968, in the case of City of Euclid v. Heaton, 15 Ohio St. 2d 65:

"1. Does the amendment repeal Title XXI of the Ohio Revised Code?

"2. Is the Judge of the Probate Division still the clerk of his own court as set out in Section 2101.11 of the Ohio Revised Code?

"3. In Section 4C of the Amendment, does the word 'clerks' or 'deputies' refer to deputy

clerks of the Common Pleas Court or clerks and deputies relating to court personnel other than deputy clerks of the Court of Common Pleas?

"4. What duties, functions or responsibilities, if any, shall the Clerk of the Court of Common Pleas assume over the operations of the Probate Division of the Court of Common Pleas?"

In answer to your first question as to whether the amendments in question repeal Title XXI of the Revised Code, your attention is invited to paragraph (C) of the schedule of the amendments. It reads as follows:

"(C) All laws and rules of court in existence upon the effective date of this amendment shall continue in effect until superseded or changed in the manner authorized by this amendment."

It is often stated by the courts that all laws in force when a new constitution or constitutional amendment takes effect, and which are not inconsistent with such constitution or constitutional amendment, remain in force even without an express provision to that effect. State, ex rel. City of Toledo v. Lynch, Auditor, 88 Ohio St. 71. Therefore, Title XXI of the Revised Code is repealed only to the extent that any provision thereof is inconsistent with the constitutional amendments in question.

The answers to your second, third and fourth questions require reference to the newly effective subsection (C), Section 4, Article IV, of the Constitution, which reads as follows:

"Unless otherwise provided by law, there shall be a probate division of the courts of common pleas, and the judges shall be elected specifically to such probate division and shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts."

Section 2101.11, Revised Code, provides in pertinent part as follows:

"Each probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint deputy clerks, stenographers, bailiff, and any other necessary employees, * * *"

There is no provision of Section 2101.11, supra, which is inconsistent with subsection (C), Section 4, Article IV, supra, nor with any other amendment in question. Therefore,

this statutory provision is still in effect, and, in answer to your second question, the judge of the probate division of the common pleas court is still clerk of his own court.

Your third question, in regard to whether the words "clerks" and "deputies" refers to deputy clerks of the common pleas court or to other court personnel may best be answered by reference to the amendment itself. It clearly provides that probate judges "* * * shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts." (Emphasis added)

In answer to your fourth question, there is no provision among the amendments proposed in Amended Substitute Joint House Resolution No. 42 which requires the assumption by the clerk of the common pleas court of any duties, functions or responsibilities over the operations of the probate division of the court.

In summary, it is my opinion and you are hereby advised:

1. The amendments contained in Amended Substitute House Joint Resolution No. 42 repeal Title XXI of the Revised Code only to the extent that any provision thereof is inconsistent with the constitutional amendments proposed in said resolution.

2. The amendments contained in Amended Substitute House Joint Resolution No. 42 do not affect Section 2101.11, Revised Code, and the judge of the probate division of the common pleas court is still the clerk of his own court as prescribed in said section.

3. The words "clerks" and "deputies", as used in subsection (C), Section 4, Amended Substitute House Joint Resolution No. 42, refer to persons employed in such capacities in the probate division of the court of common pleas.

4. No provision of any amendment proposed in Amended Substitute House Joint Resolution No. 42 requires the assumption, by the clerk of the court of common pleas, of any duties, functions or responsibilities over the operations of the probate division of the court of common pleas.

## OPINION NO. 68-127

**Syllabus:**

Non-resident servicemen are exempt from the $5 permissive tax imposed by Section 4504.02, Revised Code.

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**To: Fred Rice, Registrar, Bureau of Motor Vehicles, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, August 23, 1968**

I have before me your request for my opinion as to whether non-resident members of the Armed Forces are exempt from the $5 permissive tax established under Amended Substitute House Bill No. 919, which amends several sections of the Ohio Revised Code in order to provide additional revenues for counties and municipalities by authorizing a motor vehicle license tax.

The Supreme Court of the United States, in California v. Buzard, 382 U.S. 386 (1965), has held that the Soldiers' and Sailors' Civil Relief Act (50 U.S.C., App. Section 574) exempts a non-resident serviceman from state personal property taxes and also from having to pay motor vehicle licenses, fees, or excises, provided that the license fee, or excise required by his home state, if any, has been paid. The failure of a serviceman to pay his home state's motor vehicle license, fee, or excise entitles the state where he is stationed to exact vehicle license taxes qualifying as licenses, fees, or excises, but not to collect ad valorem taxes which do not qualify. From this holding, it would seem that the servicemen who has paid a like tax in his home state is exempt from the tax imposed by Section 4504.02, Revised Code, whether it be considered a property tax or whether it be considered a license, fee, or excise. However, the court also concluded that motor vehicles were included as personal property covered by the Soldiers' and Sailors' Civil Relief Act. The court further states that if the purpose of the state tax statute is to raise revenue, then the non-resident serviceman is exempt. The court continued:

> "The very purpose of § 514 is broadly freeing the non-resident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the states where he was present solely in compliance with military orders."

In interpreting the California statute, the Supreme Court determined that it was not the intention of Congress to require that servicemen pay some taxes for the use of their vehicles, either to their home state or to the state in which they were stationed, but that the intention was to assure that all servicemen register their vehicles and obtain identifying license plates for the purposes of traffic control, regulation, and general law enforcement.

The Ohio tax in question is more than a license or registration fee, it is a tax to raise revenue for counties and municipalities. It is my opinion, and you are so advised, that non-resident servicemen are exempt from the $5 permissive tax imposed by Section 4504.02, Revised Code.

## OPINION NO. 68-130

**Syllabus:**

1. A municipality may determine that water drainage from an abandoned mine constitutes a public nuisance. Upon such determination it may be abated by a municipal corporation acting pursuant to Section 715.44 of the Revised Code.

2. The manner in which the public nuisance is to be abated is not specified but the use of city employees and/or independent contractors in carrying out this operation is reasonable and permissible.

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**To: John J. Malik, Belmont County Pros. Atty., St. Clairsville, Ohio**
**By: William B. Saxbe, Attorney General, August 27, 1968**

I have before me your request for my opinion on whether a municipal corporation may legally undertake, through the use of its own employees and/or independent contractors, to drain a water filled abandoned mine from which mine drainage is presently entering basements, entering the sanitary sewer system, saturating terrace soil, and threatening major flooding and hill slides in the City of Martins Ferry.

Section 715.44 of the Ohio Revised Code reads in pertinent part:

> "A municipal corporation may:
>
> "(A) Abate any nuisance and prosecute in any court of competent jurisdiction, any person who creates, continues, contributes to or suffers such nuisance to exist;
>
> "* * * * * * * * *
>
> "(C) Prevent injury and annoyance from any nuisance;
>
> "* * * * * * * * *"

This section must be interpreted as though the word "public" appeared before the word "nuisance". Akron v. Klein, 171 Ohio St. 207, 168 N.E. (2d) 564. If a whole community is annoyed or inconvenienced by an offensive act, a public or common nuisance exists. Cardington v. Fredericks, 46 Ohio St. 442, 446, 21 N.E. 766. What amount of annoyance or inconvenience will constitute a nuisance is a question of degree dependent upon varying circumstances and cannot be precisely defined. Columbus Gas, Light and Coke Co. v. Freeland, 12 Ohio St. 392. In one recent case, a nuisance was defined as "the thing or act complained of as constituting such nuisance must either cause injury to the property of another, obstruct the reasonable use of enjoyment of such property or cause physical discomfort to such other person". State ex rel., Chalfin 113 Ohio App. 23, 177 N.E. (2d) 293. In addition, there is evidence that a statute authorizing a municipality to abate a nuisance confers upon municipalities a reasonable exercise of discretion to determine what is offensive, dangerous, or unwholesome and whether it is or may become an injury or annoyance to the public, and to prohibit it insofar as is reasonable and necessary to prevent injury or annoyance. Schreier v. St. Bernard, 6 O.L.R. 598, 19 OD (NP) 476.

Dean Prosser states:

> "The privilege of abatement extends to entry upon the land of another, and to the use of all reasonable force in a reasonable manner which is necessary to terminate the nuisance. * * * Most courts have held that before one is privileged to abate a nuisance he must notify the wrong doer of its existence and demand its removal, but obviously this will not be required in an emergency where there is no time for it or where it is apparent

that he is already aware of the nuisance and that such a demand would be futile." Prosser, William, Law of Torts, 2d ed. (1955) P. 420.

Without even considering the owner of the land's liability for water drainage, if the premises on which the mine is located is indeed privately owned, a municipal corporation has the authority to deem water drainage a nuisance and subsequently take action to abate it in any reasonable manner. The use of either municipal employees or independent contractors would be reasonable.

It is therefore my opinion and you are accordingly advised:

1. A municipality may determine that water drainage from an abandoned mine constitutes a public nuisance. Upon such determination it may be abated by a municipal corporation acting pursuant to Section 715.44 of the Revised Code.

2. The manner in which the public nuisance is to be abated is not specified but the use of city employees and/or independent contractors in carrying out this operation is reasonable and permissible.

## OPINION NO. 68-132

**Syllabus:**

Public safety vehicles used by law enforcement officers or others sworn to enforce the criminal traffic laws are authorized to have a red flashing light when performing functions in connection with a funeral procession and all other funeral escort vehicles are restricted to an amber colored flashing light.

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**To: Warren C. Nelson, Director, Ohio Department of Highway Safety, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, August 28, 1968**

In your request for my opinion you ask that I interpret Amended House Bill No. 878 as to the application of the various sections to funeral processions.

Accompanying your request for an opinion was a letter addressed to you from the Ohio Funeral Directors Association, Inc., indicating that the central problem for resolution is the color of flashing lights authorized on funeral escort vehicles and especially whether red flashing lights are authorized if a funeral escort vehicle is operated by the police or an individual deputized for that purpose.

The 107th General Assembly in enacting Amended House Bill No. 878, effective December 14, 1967, established a new class of vehicles in the definitions section, which class is referred to as "public safety vehicle", and in general vehicles within this class are the only vehicles authorized to use a red flashing light.

Subsection 4511.01 (E), Revised Code, reads as follows:

"(E) 'Public safety vehicle' means ambulances, motor vehicles used by public law enforcement officers or other persons sworn to enforce the criminal and traffic laws of the state, and the vehicles used by fire departments, including motor vehicles when used by volunteer firemen responding to emergency calls in the fire department service when identified as required by the director of highway safety."

Subsection 4513.17 (D), Revised Code, reads as follows:

"(D) Except a person operating a public safety vehicle, as defined in division (E) of section 4511.01 of the Revised Code, or a school bus, no person shall operate or move upon any public street or highway any vehicle or equipment which has a flashing red or a flashing combination red and white light, or any vehicle or equipment which has an oscillating or rotating red light or a combination red and white oscillating or rotating light. This section shall not prohibit the use of warning lights required by law or the simultaneous flashing of turn signals on disabled vehicles."

The legislature in Subsection 4511.17 (C), Revised Code, further restricted the use of flashing lights.

Subsection 4511.17 (C), supra, reads as follows:

"(C) Flashing lights are prohibited on motor vehicles, except as a means for indicating a right or a left turn, or in the presence of a vehicular traffic hazard requiring unusual care in approaching, or overtaking or passing. This prohibition does not apply to the use of a flashing, oscillating, or rotating amber light on emergency vehicles, * * * road service vehicles servicing or towing a disabled vehicle, traffic line stripers, snow plows, rural mail delivery vehicles, state highway survey vehicles, funeral escort vehicles, and similar equipment operated by the department or local authorities, nor to vehicles or machinery permitted by section 4513.11 of the Revised Code to have a flashing red light." (Emphasis added)

Subsection 4511.01 (VV), Revised Code, states:

"'Funeral escort vehicle' means any motor vehicle, including a funeral hearse, while used to facilitate the movement of a funeral procession."

Prior to the enactment of Amended House Bill No. 878, supra, funeral escort vehicles were permitted by statute to use flashing red lights (see former Section 4513.17, Revised Code, effective November 2, 1959; 128 Ohio Laws of Ohio 591).

The presumption is that the General Assembly had a definite purpose in its recent enactment with respect to flashing lights on motor vehicles. (See 50 Ohio Jurisprudence 2d, Section 246, Object and Purpose of Statute; Presumption and Judicial Notice, page 230).

It seems clear that the legislature intended to restrict the use of flashing lights on motor vehicles and to restrict the color of flashing lights on motor vehicles.

Public safety vehicles are expressly authorized to use red flashing lights by virtue of Subsection 4513.17 (D), supra. Other vehicles not expressly authorized by statute are prohibited by the provisions of Subsection 4511.17 (C), supra, from using any color of flashing lights except those named classes of vehicles which are permitted to use amber flashing lights.

Accordingly, it is my opinion and you are so advised that public safety vehicles used by law enforcement officers or others sworn to enforce the criminal traffic laws are authorized to have a red flashing light when performing functions in connection with a funeral procession and all other funeral escort vehicles are restricted to an amber colored flashing light.

## OPINION NO. 68-140

**Syllabus:**

The Board of County Commissioners has no authority to charge the cost of group medical insurance, procured and paid for under the authority of Section 305.171, Revised Code, against any fund other than the county general fund.

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**To: James V. Barbuto, Summit County Pros. Atty., Akron, Ohio**
**By: William B. Saxbe, Attorney General, September 23, 1968**

Your request for my opinion states that the Board of County Commissioners has decided to furnish paid hospitalization and surgical insurance to all of the county employees pursuant to the authority granted by Section 305.171, Revised Code, and further that certain of the county employees are paid out of special tax levy funds rather than from the county general fund, to wit: employees of the County Engineer's office, County Child Welfare Department, County Board of Mental Retardation, County Hospital, County Welfare Department and Soldiers Relief Commission, and you ask whether the cost of the aforesaid insurance for these "independent" county employees should be charged against the county general fund or the special funds.

County officers, boards and departments are creatures of statute and have only such powers as are conferred by statute, or as are necessarily implied from those expressly granted. Such implied powers exist to the extent that they are essential as an incident to the very existence of the office, board or department or to the complete discharge of all of the powers, duties and obligations conferred upon them by law.

Section 305.171, Revised Code, to which you referred in your letter of request, was one of three sections enacted into law by Amended Substitute House Bill No. 586 (132 Ohio Laws,

S 586), effective November 24, 1967, the purpose of which was:

> "* * * to permit boards of county commissioners, township trustees, and boards of park commissioners to pay all or part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or any combination thereof for county and township officers and employees and park district employees and their dependents."

Section 305.171, Revised Code, was enacted to read as follows:

> "The board of county commissioners of any county may procure and pay all or any part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for county officers and employees and their immediate dependents, whether issued by an insurance company or a hospital service association duly authorized to do business in this state."
> (Emphasis added)

As is seen from the above language, the legislature granted the boards of county commissioners the discretion not only to procure group medical insurance, but also the discretionary authority to pay all or any part of the cost of the group insurance so procured. Nowhere has the legislature yet granted the various county officers, boards or departments referred to in your letter of request the authority to pay all or any part of their employees' group medical insurance. Hence, the attempted procurement and payment of group medical insurance by the officers or directors of one or more of the offices, boards or departments named in your letter of request, in light of the existing statutory authority on the subject, would be without authority and illegal.

The Board of County Commissioners having elected to procure and pay all of the cost of the group medical insurance for all county employees, I find no express statutory authority enabling or authorizing said county commissioners to charge any part of the cost thereof against the appropriations or special tax levy funds of the offices, boards or departments for which these benefitted employees work. For these reasons the attempted charging of portions of the cost against special funds cannot be implied, and to do so would then be tantamount to a transfer of funds which is prohibited by Section 5705.14, Revised Code.

Furthermore, in view of the fact that it was the Board of County Commissioners that has determined to incur the permissive statutory expense, the cost of the paid group medical insurance would be a proper subject to be included in the county's levy for current expenses under the authority of Section 5705.19 (A), Revised Code. Accordingly, in light of these factors in addition to the lack of express statutory authority, I cannot imply the authority to charge any part of paid group medical insurance costs for the above-enumerated county employees against the special tax levy funds.

Therefore, it is my opinion and you are hereby advised that the Board of County Commissioners has no authority to charge the cost of group medical insurance, procured and paid for under the authority of Section 305.171, Revised Code, against any fund other than the county general fund.

## OPINION NO. 68-152

**Syllabus:**

1. A board of county commissioners is authorized by law to issue bonds for the construction of a county courthouse larger than that required to meet the present and/or future needs of the county and with the express intention of leasing the surplus space to a municipal corporation located within the county.

2. There is no specific constitutional limitation upon the home rule authority of a charter municipal corporation to acquire and hold building space for municipal purposes or upon the manner of such acquisition. A charter municipal corporation may acquire interests in property for municipal purposes by purchase, gift, devise, appropriation, lease or otherwise, unless expressly prohibited by the Constitution, the municipal charter, or municipal ordinance. As to similar authority in noncharter municipal corporations, see Chapter 715, Revised Code.

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**To: Robert L. Balyeat, Allen County Pros. Atty., Lima, Ohio**
**By: William B. Saxbe, Attorney General, November 13, 1968**

Your letter requesting my opinion reads in pertinent part as follows:

> "Allen County and the City of Lima are presently considering the construction of a new joint facility which would replace the present county courthouse and also house the administrative offices of the City. Although the plans are merely at the formative stage at present, one of the methods under consideration for financing the improvement is the issuance of bonds by the Board of County Commissioners for the entire cost of the improvement. If this method were adopted, the County would, of course, own the building and would lease sufficient space to the City to meet the latter's needs. There are two questions which have arisen in connection with this method of proceeding upon which I would appreciate your consideration and opinion. They are as follows:
>
> 1. Is a board of county commissioners

properly authorized under the laws of this State to issue bonds for the construction of a county courthouse larger than that required to meet the present and/or future needs of the county and with the express intention of leasing the surplus space to a municipal corporation located within the county?

2. What is the maximum term for which the City of Lima could lease space from Allen County in the facility contemplated?

"For your information and assistance in answering the second question, I would point out that the City of Lima has home rule power under its Charter. The provisions contained in the Charter with regard to the leasing and acquisition of real estate are of a general nature and, rather than attempt to determine which provisions might be of significance in this connection, I have enclosed herewith a copy of the Charter of the City of Lima in its entirety for your examination. I would further point out, although it is probably unnecessary to do so, that the lease contemplated would be an ordinary lease without an option to purchase or any of the provisions normally associated with what we know and refer to as lease-purchase agreements."

Section 307.29, Revised Code (superseding Section 2419-2, General Code), reads as follows:

"The board of county commissioners may, by agreement with the city council, the director of public safety or his successor, or the person or board charged with the erection, maintenance, or repair of police stations, jails, police and municipal courthouse and courtrooms, lease to any municipal corporation in the county suitable quarters in county buildings, erected or to be erected, for municipal courts, police stations, police courts, prosecutors' offices, probationers' offices, and other similar municipal purposes. Whenever the board of any county has made such an agreement with a municipal corporation the board may erect a county building anticipating and making provision for such municipal quarters."

Such section authorizes the board of county commissioners to lease to any municipal corporation in the county suitable quarters in county buildings, erected or to be erected for specified municipal purposes. For further analysis of

such authority, see Opinion No. 700, Opinions of the Attorney General for 1929, and Opinion No. 1909, Opinions of the Attorney General for 1938.

Sections 307.01 and 307.02, Revised Code, empower the county commissioners to acquire or construct a county courthouse.

Section 133.24, Revised Code, reads in part as follows:

> "The taxing authority of any subdivision may issue the bonds of such subdivision for the purpose of acquiring or constructing any permanent improvement which such subdivision is authorized to acquire or construct. * * *"

Section 133.01 (C), Revised Code, provides that "taxing authority" means in the case of any county, the board of county commissioners. Section 133.01 (E), Revised Code, provides that "permanent improvement" means any property, asset or improvement with an estimated life or usefulness of five years or more, including land and interests therein, and including reconstructions, enlargements, and extensions thereof having an estimated life or usefulness of five years or more. The construction of a county courthouse is such a permanent improvement.

In my opinion, in answer to your first question, a board of county commissioners is authorized by law to issue bonds for the construction of a county courthouse larger than that required to meet the present and/or future needs of the county and with the express intention of leasing the surplus space to a municipal corporation located within the county.

Section 307.09, Revised Code, reads in pertinent part as follows:

> "If the interests of the county so require, the board of county commissioners may sell any real estate belonging to the county

> and not needed for public use, or may lease it, * * * provided further, the board may grant leases, rights, and easements to municipal corporations or other governmental subdivisions for public purposes * * *. Any such lease, right, or easement granted to a municipal corporation or other governmental subdivision * * * may be for such length of time, upon such terms, for such purposes, and may provide for such renewals thereof as the board deems for the best interests of the public. * * *"

The board of county commissioners' authority to lease real estate belonging to the county to a municipal corporation is provided by this section. The determination of the maximum length of time, terms, purposes for granting such lease, and any renewal of leases to municipal corporations is, as lessor, within the sound discretion of the board of county commissioners as provided by Section 307.09, Revised Code.

Your second question concerns the authority of a particular charter municipal corporation, the City of Lima, as lessee, to lease space from the County.

There is no specific constitutional limitation upon the home rule authority of a charter municipal corporation to acquire and hold building space for municipal purposes or upon the manner of such acquisition. A charter municipal corporation may acquire interests in property for municipal purposes by purchase, gift, devise, appropriation, lease or otherwise, unless expressly prohibited by the Constitution, the municipal charter, or municipal ordinance. As to similar authority in noncharter municipal corporations, see Chapter 715, Revised Code.

I do not deem it appropriate for the Attorney General to review in detail the municipal corporation's charter and the municipal corporation's ordinances to determine the nature, manner and limitations upon the authority of such municipality to enter into leasing agreements, as lessee.

In my opinion, there is no constitutional nor an applicable statutory limitation upon the length of time which a charter municipal corporation might lease space in a county building.

## OPINION NO. 68-155

**Syllabus:**

1. A township or municipal police officer may make a lawful arrest within another jurisdiction with which such officer's township or municipality has contracted for police protection pursuant to Sections 505.441 or 737.04, Revised Code.

2. An oath of office need not be administered to a township or municipal police officer by authorities of another jurisdiction when the performance of the officer's duties within such other jurisdiction are pursuant to police protection contracts authorized by Sections 505.441 and 737.04, Revised Code.

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**To: Gene Henry, Geauga County Pros. Atty., Chardon, Ohio**
**By: William B. Saxbe, Attorney General, November 14, 1968**

I have before me your request for my opinion which asks two questions:

(1) Would a township or municipal police officer acting pursuant to a police protection contract be able to make a lawful arrest within the jurisdiction with whom the police officer's township or municipality has contracted?

(2) Would these non resident police officers have to be sworn by authorities of both contracting jurisdictions?

It is well established that a township police officer may not arrest outside the limits of his township in the absence of legislative authority. Opinion No. 1863, Opinions of the Attorney General for 1938. Similarly, the powers of a municipal corporation cannot be exercised beyond the territorial limits of the corporation in the absence of statutory authority for such purpose. Prudential Coop Realty Co. vs. Youngstown, 118 Ohio St. 204. Thus, arrest by either a township or municipal police officer in another jurisdiction would be invalid per se without affirmative state legislative support.

Section 505.441, Revised Code, reads:

> "In order to obtain police protection, or to obtain additional police protection in times of emergency, any township may enter into a contract with one or more townships, municipal corporations, or county sheriffs upon such terms as are agreed to by them, for services of police

**departments or use of police equipment, or the interchange of the service of police departments or use of police equipment within the several territories of the contracting subdivisions, if such contract is first authorized by respective boards of township trustees or other legislative bodies.**

"Section 701.02 of the Revised Code, so far as it is applicable to the operation of police departments, applies to the contracting political subdivisions and police department members when such members are rendering service outside their own subdivision pursuant to such contract.

"Police department members acting outside the subdivision in which they are employed may participate in any pension or indemnity fund established by their employer to the same extent as while acting within the employing subdivision, and are entitled to all the rights and benefits of sections 4123.01 to 4123.94, inclusive, of the Revised Code, to the same extent as while performing service within the subdivision.

"Such contract may provide for a fixed annual charge to be paid at the time agreed upon and stipulated in the contract."

Section 737.04, Revised Code, reads:

"Any municipal corporation may, in order to obtain police protection or to obtain additional police protection, enter into contracts for a period not to exceed three years, with one or more municipal corporations, upon such terms as are agreed upon for services of police departments or the use of police equipment or for the interchange of such service or equipment within the several territories of the contracting subdivisions. Such contract shall first be authorized by the respective legislative authorities.

"Section 701.02 of the Revised Code, so far as it applies to the operation of police departments, shall apply to the contracting political subdivisions and to the police department members when they are rendering service outside their own subdivisions, pursuant to such contracts.

"Police department members acting outside the subdivision in which they are employed, pursuant to such contracts, shall be entitled to, if the rules of the board of trustees of the policemen's pension or indemnity fund provide therefore, participate in any pension or indemnity fund established by their employer to the same extent as while acting within the employing subdivision. Such members shall be entitled to all the rights and benefits of sections 4123.01

to 4123.94, inclusive, of the Revised Code, to the same extent as while performing service within the subdivision.

"Such contracts may provide for:

"(A) A fixed annual charge to be paid at the times agreed upon and stipulated therein;

"(B) Compensation based upon:

"(1) A stipulated price for each call or emergency;

"(2) The number of members or pieces of equipment employed;

"(3) The elapsed time of service required in such call or emergency;

"(C) Compensation for loss or damage to equipment while engaged outside the limits of the subdivision owning and furnishing the equipment;

"(D) Reimbursement of the subdivision in which the police department members are employed for any pension or indemnity award or premium contribution assessed against the employing subdivision for workmen's compensation benefits for injuries or death of its police department members occurring while engaged in rendering such service."

Sections 505.441 and 737.04, supra, require the conclusion that a police officer pursuing his official duty to another jurisdiction pursuant to a mutual police protection contract may make lawful arrests as an inherent part of the duties and responsibilities of his position. Sections 505.441 and 737.04, supra, make provision for workmen's compensation and negligence coverage, which lends additional emphasis to the belief that the legislative intent was that such officers should perform completely their official functions while in another jurisdiction pursuant to a police protection contract.

I tacitly assumed this conclusion in Opinion No. 66-179, Opinions of the Attorney General for 1966, page 385, when I noted that a police officer was entitled to disability payments after being injured while acting pursuant to a mutual protection contract in another jurisdiction, while performing his official duty. "Official duty" was defined as having some direct connection with duties, responsibilities, and authority of the police department with which the officer was affiliated. Opinion No. 66-179, supra, page 384. Arrest in the proper circumstances would most assuredly be one of the "official duties" of a police officer acting pursuant to Sections 505.441 or 737.04, supra, in another contracting jurisdiction.

Since a police officer may be given extra jurisdictional authority by a contract made pursuant to Sections 505.441 or 737.04, supra, his oath of office administered by his own township or municipality suffices for all "official duty" of his

unit's police department. "Official duty" includes all police work performed pursuant to the terms of police protection contract.

Therefore, it is my opinion and you are advised that:

1. A township or municipal police officer may make a lawful arrest within another jurisdiction with which such officer's township or municipality has contracted for police protection pursuant to Sections 505.441 or 737.04, Revised Code.

2. An oath of office need not be administered to a township or municipal police officer by authorities of another jurisdiction when the performance of the officer's duties within such other jurisdiction are pursuant to police protection contracts authorized by Sections 505.441 and 737.04, Revised Code.

## OPINION NO. 68-156

**Syllabus:**

1. The Youngstown City Board of Education may amend its school calendar and thereby call for the teaching services of its teachers to be performed in June, 1969, instead of December, 1968.

2. Noncertificated employees of the Board may be laid off for reasons of economy for the month of December, 1968, without violating the Ohio civil service regulations.

3. Auxiliary services and transportation services provided for students attending non-public schools must be continued for the month of December, 1968, even if the public schools are closed during this period.

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**To: Martin W. Essex, Supt. of Public Instruction, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, November 27, 1968**

I have before me your request for my opinion on some matters concerning the fact that the Youngstown City Board of Education will be forced to consider the termination of school services on or about December 1, 1968, for the remainder of the calendar year of 1968, in the event that the electors fail to approve the 12-mill levy submitted at the general election.

Your specific questions are:

1. "Can the Board properly suspend the services of a teaching employee for a period such as from December 1 through December 20 and, thus, by amending the school calendar, call for such teaching services in June, 1969, as a part of the contract year?

2. Can the Board legally suspend, reduce or eliminate the services of noncertificated employees who are affected by civil service regulations on the basis that no funds are currently available or in process of collection for the current year for a period such as December 1, 1968, through December 20, 1968, and, thus, reinstate such services after January 1, 1969?

3. In the matter of auxiliary services, as rendered by the State of Ohio, for example school transportation for students attending nonpublic schools, what then is the prerogative of the Board for suspending such services or, in fact, for continuing such services when such service and programs for public school pupils are suspended for a period such as December 1, 1968 through December 20, 1968?"

Your first question can be answered by an analysis of the pertinent statutes and cases construing them. Section 3313.62, Revised Code, defines the school year as follows:

> "The school year shall begin on the first day of July of each calendar year and close on the thirtieth day of June of the succeeding calendar year. A school week shall consist of five days, and a school month of four school weeks."

Section 3313.48, Revised Code, defines the minimum school year as follows:

> "The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof. Every day school so provided shall be open for instruction with pupils in attendance for not less than one hundred seventy-six days in each school year, or as provided in sections 3313.481 [3313.48.1] and 3313.482 [3313.48.2] of the Revised Code, less the number of days the school is closed as a result of public calamity, as provided in section 3317.01 of the Revised Code. * * *"

The court in <u>In re Sheard</u>, 82 Ohio Law Abs. 259, 261 noted the following:

> "* * * Sec. 3313.62 R.C., provides for a full twelve month school year beginning on July 1st and ending on June 30th. While the statutes provide for a minimum period of school instruction, Sec. 3313.48 R.C., there are no statutory rules as to when the school term should begin or end. <u>That decision is left to the discretion of the local school board.</u> * * *" (Emphasis added)

In arranging a schedule for the school year, a board of

education is authorized to designate a date for its official termination. (State ex rel. Brown v. Board of Education, 162 Ohio St. 589)

It is clear that local school boards control the school calendar, and that the boards must schedule a minimum of one hundred seventy-six school days sometime between the first day of July and the thirtieth day of June of the succeeding calendar year. If a school board wishes to schedule no school days in December and a full schedule of school days in June, this would appear to be entirely within its discretion. I have been informed that these teachers have contracted to teach for the "school year" of 1968-1969, which is to consist of some thirty-eight (38) school weeks. The school board has the authority to amend its school calendar and allocate some of these weeks to June, 1969, instead of December, 1968. The teachers need not be "suspended", but rather should be informed of the board's action in amending the school calendar.

The answer to your second question is two-fold. If the noncertificated employees have contracted to perform services for the same 38-week "school year" as the teachers, then the weeks during which their services will be performed may be changed by the above-mentioned amendment of the school calendar. This, of course, would not amount to a suspension, reduction or elimination of their services.

If, however, some or all of these noncertificated employees are employed on a twelve-month basis, then it would be necessary for them to be laid off during the month of December, 1968, for reasons of economy. There is abundant authority for such an economy move, as is illustrated by the syllabus in De Remer v. Board of Education of Akron City School District, 72 Ohio App. 283:

> "Public bodies, which for their operation are dependent upon funds derived from taxes, must necessarily, and in the absence of laws to the contrary are required to, curtail their operations so as to keep their expenditures within their available funds; and a sound public policy demands that, in the interest of public economy, they have a right to reduce their working forces by layoffs, in order to prevent deficiencies in the public funds."

Similar decisions have been reached in other cases which specifically hold that the civil service laws are not violated by such economy layoffs. (See Curtis, Safety Director v. State ex rel. Morgan, 108 Ohio St. 292; State ex rel. Buckman v. Munson, Dir., 141 Ohio St. 319)

Your third question concerns "auxiliary services" which are rendered to non-public schools. These services are, for the most part, authorized under Section 3317.06 (H), Revised Code. The funding is separate from the other parts of the local school district's program. The local school district acts as a conduit for the flow of money from the state to the non-public schools. Therefore, the closing of the public schools in Youngstown during December, 1968 will not necessitate suspending the flow of money for these auxiliary services to the non-public schools.

The particular service which you mention in your third question is that of transportation for students attending non-public schools. As you know, this particular service is authorized and controlled by Section 3327.01, Revised Code, which states as pertinent:

> "In all city, exempted village, and local school districts where resident elementary school pupils live more than two miles from the school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code and to which they are assigned by the board of education of the district of residence or to and from the non-public school which they attend the board of education shall provide transportation for such pupils to and from such school except when, in the judgment of such board, confirmed by the state board of education, such transportation is unnecessary or unreasonable.
>
> "In all city, exempted village, and local school districts the board may provide transportation for resident high school pupils to and from the high school to which they are assigned by the board of education of the district of residence or to and from the non-public high school which they attend for which the state board of education prescribed minimum standards pursuant to division (D) of section 3301.07 of the Revised Code.
>
> "In determining the necessity for transportation, availability of facilities and distance to the school shall be considered.
>
> "A board of education shall not be required to transport elementary or high school pupils to and from a non-public school where such transportation would require more than thirty minutes of direct travel time as measured by school bus from the collection point as designated by the coordinator of school transportation, appointed under section 3327.011 [3327.01.1] of the Revised Code, for the attendance area of the district of residence.
>
> "Where it is impractical to transport a pupil by school conveyance, a board of education may, in lieu of providing such transportation, pay a parent, guardian, or other person in charge of such child, an amount per pupil which shall in no event exceed the average transportation cost per pupil, such average cost to be based on the cost of transportation of children by all boards of education in this state during the next preceding year.
>
> "In all city, exempted village, and local school districts the board shall provide transportation for all children who are so crippled that they are unable to walk to and from the school for

which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code and which they attend.

"* * * * * * * * *"
(Emphasis added)

The use of the word, "shall", in the above portion of the statute makes it mandatory that school districts transport resident elementary school pupils who live more than two miles from their schools and transport the described crippled children. Other portions of the above section make it optional for the districts to transport high school students and optional to transport elementary students who live within two miles of their schools. This statute and the regulations and guidelines of the State Board of Education make it clear that each school district must provide the above-mentioned mandatory transportation to students attending non-public schools, and that whatever permissive or optional transportation is provided for students attending public schools must also be provided for students who attend non-public schools. The only exception is that provided by the statutory requirement that the non-public school in question must be within thirty minutes of direct travel time from the collection point.

The Youngstown City Board of Education is reimbursed for the transportation costs involved in transporting pupils to non-public schools in accordance with a formula adopted by the State Board of Education pursuant to Section 3317.051, Revised Code. The Board will be reimbursed for such costs regardless of whether or not the public schools are in session in December, 1968. Therefore, the closing of the public schools in December, 1968 should not affect the Board's duty to provide transportation for pupils attending non-public schools.

The Youngstown City Board of Education cannot, of course, control the school calendar of the non-public schools in the area. However, the above transportation duties clearly devolve upon the Board even if the calendars to not coincide.

Therefore, if the Board decides to close the public schools for the month of December, 1968, it still must provide the usual pupil transportation services to those pupils who will be attending the non-public schools in its area.

Accordingly, it is my opinion and you are hereby advised that:

1. The Youngstown City Board of Education may amend its school calendar and thereby call for the teaching services of its teachers to be performed in June, 1969, instead of December, 1968.

2. Noncertificated employees of the Board may be laid off for reasons of economy for the month of December, 1968, without violating the Ohio civil service regulations.

3. Auxiliary services and transportation services provided for students attending non-public schools must be continued for the month of December, 1968, even if the public schools are closed during this period.

## OPINION NO. 68-159

**Syllabus:**

The Federal Freedom of Information Act (Section 552, Title 5, U.S. Code) does not impose a duty upon the Ohio Department of Public Welfare to make available to interested persons compliance report forms and reports of on-site inspections of nursing homes.

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**To: Denver L. White, Director, Dept. Public Welfare, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, December 2, 1968**

In your request for my opinion you ask whether the Federal Freedom of Information Act requires that the Ohio Department of Public Welfare make available to interested persons certain compliance forms completed by operators of nursing homes and certain reports made by your staff members regarding on-site inspections of nursing homes. You explain that these compliance forms and inspection reports represent part of your department's efforts to assure itself that these homes are in compliance with regulations issued pursuant to Title VI of the Civil Rights Act of 1964.

Federal Freedom of Information Act is the popular name for the law which is now codified in Section 552, Title 5, of the United States Code. As its name implies, this law was enacted to provide guidelines for the public availability of the records of federal departments and agencies.

Section 552, Title 5, U.S. Code, begins as follows:

> "552 (a) Each agency shall make available to the public information as follows: * * *"

The controlling definition of "agency" is given in Section 551, Title 5, U.S. Code:

> "551. For the purpose of this subchapter - (1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -
>
> (A) the Congress;
>
> (B) the courts of the United States; * * *"

Thus, the term, "agency," applies to all the organizational units in the executive branch of the federal government. The Ohio Department of Public Welfare is not, of course, a part of the executive branch of the federal government. Therefore, your department is not controlled by any requirement of the Federal Freedom of Information Act.

Even if your department were subject to this law, the docu-

ments in question appear to fall clearly within the exemption listed in Section 552 (b) (7), Title 5, U.S. Code:

> "552 (b) This section does not apply to matters that are -
>
> * * * * * * * * *
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;"

Your federal counterpart, the Department of Health, Education and Welfare, has issued regulations which implement the application of Section 552, Title 5, U.S. Code, to the records of that federal department. These regulations are compiled in 45 CFR 5. The regulation which applies the exemption of Section 552 (b) (7), Title 5, U.S. Code, supra, to the records of the federal Department of Health, Education and Welfare is 45 CFR 5.77:

> "5.77 Investigatory files compiled for law enforcement purposes * * *
>
> This exemption covers all matters, including sources of information or complaints, in investigative files and reports compiled for law enforcement or regulatory activities of the Department, or relating to matters in litigation."
> (Emphasis added)

In addition to falling within the general exemption above, the records in question appear to be listed as a specific exemption. Appendix A to 45 CFR 5, lists examples of kinds of exempt records. Item 15 appears to include exactly the type of documents mentioned in your request for my opinion:

> "45 CFR 5
>
> Appendix A - Examples of Kinds of Exempt Records
>
> * * * * * * * * *
>
> 15. Records to the extent they reveal names of complainants, drug abusers or informers; audit, civil rights, disciplinary, grievance, security, and other investigation files, including reports of interviews, signed or sworn statements or other reports and related material."
> (Emphasis added)

Thus, even if your department were covered in general by the Federal Freedom of Information Act, the specific reports in question would be exempted from disclosure.

Therefore, it is my opinion, and you are hereby advised that the Federal Freedom of Information Act does not impose a duty upon the Ohio Department of Public Welfare to make available to interested persons compliance report forms and reports of on-site inspections of nursing homes.

## OPINION NO. 68-161

**Syllabus:**

A driver of a school bus may not inflict corporal punishment upon a student passenger being transported to and from school.

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**To: John M. Oswald, Warren County Pros. Atty., Lebanon, Ohio**
**By: William B. Saxbe, Attorney General, December 2, 1968**

I am in receipt of your request for my opinion which asks whether a driver of a school bus may inflict corporal punishment upon a student who is a passenger on the bus and being transported to or from school.

The Ohio General Assembly in Section 3313.20, Revised Code, empowers a board of education to make such rules and regulations as are necessary for its government and the government of its employees and the pupils of the schools. This statute, together with the general statutes concerning the powers of boards of education, confers upon such boards plenary authority and responsibility for the conduct, control, regulation and supervision of the pupils. 48 O. Jur. 2d, Section 84, page 787. Therefore, it might appear that a school board under the wide discretion granted by the legislature might authorize by rule or regulation, a school bus driver to administer corporal punishment on unruly student passengers.

However, the board's discretion to regulate and supervise the conduct of pupils is subject to statutory limitation. Section 3319.41, Revised Code, limits the individuals authorized to administer corporal punishment.

This statute reads as follows:

> "A person employed or engaged as a teacher, principal, or administrator in a school, whether public or private, may inflict or cause to be inflicted, reasonable corporal punishment upon a pupil attending such school whenever such punishment is reasonably necessary in order to preserve discipline while such pupil is subject to school authority. Such person may also, within the scope of his employment, use and apply such amount of force as is reasonable and necessary to quall a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil, for the purpose of self-defense, or for the protection of persons or property."

Thus, while Section 3313.20, supra, grants local school boards the right to provide by regulation for the corporal punishment of pupils, the legislature has provided by statute who is authorized to inflict or cause such punishment to be inflicted. Only a "teacher, principal or administrator" has the statutory

right under Section 3319.41, supra, to administer corporal punishment upon a pupil when such punishment is deemed reasonably necessary.

Therefore, I can only conclude that since the legislature has not seen fit to include school bus drivers as among the school officials authorized by statute to impose corporal punishment or to cause its imposition, a driver of a school bus is prevented by statutory classification from inflicting corporal punishment upon a student passenger being transported to and from school.

Accordingly, it is my opinion and you are hereby advised that a driver of a school bus may not inflict corporal punishment upon a student passenger being transported to and from school.

## OPINION NO. 68-165

**Syllabus:**

1. The statutory exemptions provided in division (F) (3) of Section 319.54, Revised Code, exempting certain transfers and deeds from the transfer fee and permissive county real estate transfer tax, should be construed strictly, but reasonably, in favor of the fee and tax and against exemption.

2. The county auditor has the inherent authority, in receiving statements of value and administering Section 319.202 [319.20.2], Revised Code, and in collecting the permissive real property transfer tax authorized to be levied pursuant to Chapter 322, Revised Code, to inquire into the facts and circumstances surrounding any and all transfers or conveyances claimed to be exempt under division (F) (3) of Section 319.54, Revised Code, in order to determine if the one claiming the exemption has affirmatively established his right to the exemption.

3. A transfer of real estate by a settlor to a trustee which, upon termination of the trust, is to be distributed to the settlor's lineal descendents per stirpes would not be exempt from the transfer fee and transfer tax under either subparagraph (d), (m) or (o) of division (F) (3) of Section 319.54, Revised Code.

4. A transfer of a lot by the owner to a builder so that the builder can obtain a construction mortgage and erect a dwelling upon the lot for the owner, the lot and dwelling to be conveyed to the owner upon completion, would be exempt from the transfer fee and transfer tax under subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

5. A transfer of real estate by an agent, who had purchased said real estate at a sheriff's sale using this principal's money for the purchase price, would be exempt from the transfer fee and transfer tax under subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

**To: James V. Barbuto, Summit County Pros. Atty., Akron, Ohio**
**By: William B. Saxbe, Attorney General, December 4, 1968**

Your request for my opinion sets forth the following transactions involving transfers of real estate, to wit:

> "1. Transfer by settlor to a trustee for persons entitled to inherit while he is still alive. This involves the trustee for persons named in sub paragraph 'D' and it does not involve any type of sale or consideration. We enclose copy of typical trustee agreement.
>
> "2. Transfers to and from a person who is acting as a trustee for the grantor and is making the transfer back to the grantor. Typical examples are as follows:
>
> > A lot owner transfers the lot to the builder for purpose of the builder receiving construction mortgage thereon, and erecting a dwelling for the grantor. On completion the builder conveys the lot and the dwelling back to the grantor.
> >
> > A purchaser at a sheriff's sale, acting as agent for a third party now conveys to the party who, in fact, paid the purchase price at the sheriff's sale."

and you ask whether any of these transfers are exempted from the transfer fee provided in division (F) (3) of Section 319.54, Revised Code.

Division (A) of Section 319.202 [319.20.2], Revised Code, provides in pertinent part:

> "(A) Before the county auditor indorses any real property conveyance presented to him pursuant to section 319.20 of the Revised Code, the grantee or his representative shall submit in triplicate a statement, prescribed by the board of tax appeals and other information as the county auditor may require, declaring the value of real property conveyed, except when the transfer is exempt under division (F) (3) section 319.54 of the Revised Code only a statement of the reason for the exemption shall be required. The grantor shall pay the fee required by division (F) (3) of section 319.54 of the Revised Code; and, in the event the board of county commissioners of the county has levied a real property transfer tax pursuant to Chapter 322. of the Revised Code, the amount required by the real property transfer tax so levied. If the conveyance is exempt from the fee provided for in division (F) (3) of section 319.54 of the Revised Code and the tax, if any, levied pursu-

ant to Chapter 322. of the Revised Code, the reason for such exemption shall be shown on the statement. Value means, in the case of any deed not a gift in whole or part, the amount of the full consideration therefor, paid or to be paid for the real estate described in the deed, including the amount of any mortgage or vendor's lien thereon, and, in the case of a gift in whole or part, the estimated price the real estate described in the deed would bring in the open market and under the then existing and prevailing market conditions in a sale between a willing seller and a willing buyer, both conversant with the property and with prevailing general price levels. * * *" (Emphasis added)

As can be observed from the above quotation, the grantee is required to submit a statement of the value of the real estate transferred irrespective of whether the transfer is for a consideration or is a gift, unless the transfer is specifically exempted under division (F) (3) of Section 319.54, Revised Code.

Section 319.54, Revised Code, provides in pertinent part:

"(F) The county auditor shall charge and receive fees as follows:

"* * * * * * * * *

"(3) For receiving statements of value and administering section 319.202 [319.20.2] of the Revised Code, one dollar, or ten cents per hundred dollars for each one hundred dollars or fraction thereof of the value of real property transferred, whichever is greater, except no fee shall be charged when the transfer is made:

"* * * * * * * * *

"(d) To evidence a gift between husband and wife, or parent and child or the spouse of either;

"* * * * * * * * *

"(m) To or from a person when no consideration is paid or to be paid for the real estate and the transaction is not a gift;

"* * * * * * * * *

"(o) To a trustee acting on behalf of minor children of the deceased;"

Before examining into the question of whether the par-

ticular situations set forth in your letter are exempt, it must be noted that the exemptions from the auditor's fee also are the exemptions provided by law from the permissive real estate transfer tax authorized to be levied in Chapter 322, Revised Code. See the definition of "Deed" contained in division (B) of Section 322.01, Revised Code. Therefore, considering that the transfer fee is upon all transfers unless specifically exempted by law and the permissive real estate tax is levied upon all deeds conveying real property unless specifically exempted by law, said law being division (F) (3) of Section 319.54, Revised Code, the specific exemptions contained in said exemption provision must be strictly, but reasonably, construed in favor of the fee and tax and against exemption therefrom. See State, ex rel. Keller, v. Forney et al., Tax Commission of Ohio, 108 Ohio St. 463, wherein the first branch of the syllabus reads:

> "1. Exceptions to the operation of laws, whether statutory or constitutional, should receive strict, but reasonable, construction."

Also, the second branch of the syllabus in the case of National Tube Co. v. Glander, Tax Commr., 157 Ohio St. 407, reads:

> "2. Statutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto."

In regard to the collection or exemption of the fee and the tax, the county auditor and his deputies have the inherent authority, in administering the fee and tax, to inquire into the facts and circumstances surrounding any and all transfers or conveyances of real estate which are claimed to be exempt so as to determine if the one claiming the exemption has affirmatively established his right to the exemption claimed. Accordingly, I will now consider

your questions upon the premise that the facts and circumstances stated are proven to exist.

In regard to your first situation, involving a transfer of real estate by the settlor to a trustee for the use and benefit of persons entitled to inherit from the settlor, I have examined the "typical trustee agreement" which you have submitted, and must conclude that the transfer would not qualify for exemption under either subparagraph (d) or (m) of division (F) (3) of Section 319.54, Revised Code. In analyzing the "typical trustee agreement," I note that the transfer is in trust as a gift to the beneficiaries and thus would not qualify under subparagraph (m). Furthermore, since the trust is to be distributed, upon termination thereof, to the settlor's living descendents, not being limited to the settlor's children or their spouses, the transfer in trust would not qualify for exemption under subparagraph (d). This conclusion is supported by the fact that the legislature has expressly exempted transfers "To a trustee acting on behalf of minor children of the deceased" in subparagraph (o) of division (F) (3) of Section 319.54, Revised Code.

In regard to your second situation, which you describe as a transfer to or from a person acting as a trustee and making the transfer back to the grantor, you first give as an example a transfer by a lot owner to a builder for the purpose of the builder's obtaining a construction loan and erecting a dwelling thereon for the grantor. Upon completion, the builder conveys the lot and building back to the grantor. It is my opinion that this example would not be subject to the transfer fee by reason of the clear applicability of the language of subparagraph (m) of division (F) (3) of Section 319.54, Revised Code. Likewise, the other example, a transfer

by an agent, who has purchased real estate at a sheriff's sale using his principal's money for the purchase price, to his principal, would also fall within the express provisions of subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

Therefore, it is my opinion, and you are hereby advised, that:

1. The statutory exemptions provided in division (F) (3) of Section 319.54, Revised Code, exempting certain transfers and deeds from the transfer fee and permissive county real estate transfer tax, should be construed strictly, but reasonably, in favor of the fee and tax and against exemption.

2. The county auditor has the inherent authority, in receiving statements of value and administering Section 319.202 [319.20.2], Revised Code, and in collecting the permissive real property transfer tax authorized to be levied pursuant to Chapter 322, Revised Code, to inquire into the facts and circumstances surrounding any and all transfers or conveyances claimed to be exempt under division (F) (3) of Section 319.54, Revised Code, in order to determine if the one claiming the exemption has affirmatively established his right to the exemption.

3. A transfer of real estate by a settlor to a trustee which, upon termination of the trust, is to be distributed to the settlor's lineal descendents per stirpes would not be exempt from the transfer fee and transfer tax under either subparagraph (d), (m) or (o) of division (F) (3) of Section 319.54, Revised Code.

4. A transfer of a lot by the owner to a builder so that the builder can obtain a construction mortgage and erect a dwelling upon the lot for the owner, the lot and dwelling to be conveyed to the owner upon completion, would

be exempt from the transfer fee and transfer tax under subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

5. A transfer of real estate by an agent, who had purchased said real estate at a sheriff's sale using this principal's money for the purchase price, would be exempt from the transfer fee and transfer tax under subparagraph (m) of division (F) (3) of Section 319.54, Revised Code.

## OPINION NO. 68-168

**Syllabus:**

The Assistant Director of Natural Resources may not substitute for the Director of Natural Resources as a member of the Ohio Water Development Authority.

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**To: Larry H. Snyder, Chairman, Ohio Water Development Authority, Columbus, Ohio**
**By: William B. Saxbe, Attorney General, December 13, 1968**

I have before me your request of November 21, 1968, for my opinion wherein you ask whether the Assistant Director of Natural Resources may substitute for the Director of Natural Resources from time to time in the exercise of the functions of the office of member of the Ohio Water Development Authority.

Section 6121.02, Revised Code, provides in pertinent part:

> "The authority shall consist of seven members as follows: five members appointed by the governor, with the advice and consent of the senate, no more than three of whom shall be members of the same political party, and the director of natural resources and the director of health who shall be members ex officio without compensation. * * *"

The question presented requires interpretation of Section 1501.051, Revised Code, which provides in pertinent part as follows:

> "The assistant director or a deputy director may, at the request of the director, serve in his place as member of any board, committee or commission of which the director is, by law, a member."

It is clear that if the name of the Ohio Water Development

Authority was instead Ohio Water Development Board, Committee or Commission, the Assistant Director of Natural Resources could serve in the place of the Director as a member of that body. However, the Legislature chose to designate the body created by Chapter 6121, Revised Code, an authority.

I note that the above quoted part of Section 1501.051, supra, enacted by the 107th General Assembly was effective December 14, 1967. At that time there was in existence other legislatively created or authorized bodies designated "authorities." For example, see Chapter 4582, Revised Code, which authorizes port authorities and Chapter 152, Revised Code, which created the Ohio Building Authority. The Ohio Legislature must be presumed to have had a purpose in excluding the designation "authority" from the enumeration of bodies in Section 1501.051, supra, on which the Assistant Director of Natural Resources may serve, as a member, in the place of the Director of Natural Resources. Knowing that government bodies had been designated "authorities" in addition to having been designated "boards," "committees" or "commissions" and excluding "authorities" from those bodies on which the Assistant Director of Natural Resources may serve in the place of the Director of Natural Resources, I conclude that the Legislature did not intend to authorize this substitution on "authorities." The application of the maxim of statutory construction, expressio unius est exclusio alterius, requires that when certain things are specified in a law an intention to exclude all others may be inferred.

I am enforced in this conclusion by the choice of the 107th General Assembly of the designation "authority" for the body created by Chapter 6121, Revised Code. That Chapter which created the Ohio Water Development Authority was effective March 7, 1968, which time was subsequent to the effective date of the provisions of Section 1501.051, supra. With knowledge of the provisions of Section 1501.051, supra, which it had just enacted the 107th General Assembly chose to designate your body an "authority" and not a "board," "committee" or "commission." Had the General Assembly intended the provisions of Section 1501.051, supra, to apply it could have designated the body created by Chapter 6121, Revised Code, a board, committee or commission or it could have amended Section 1501.051, supra, to include "authority."

Accordingly, it is my opinion and you are hereby advised that the Assistant Director of Natural Resources may not substitute for the Director of Natural Resources as a member of the Ohio Water Development Authority.

## OPINION NO. 68-170

**Syllabus:**

The County Board of Mental Retardation, with the concurrence of the Commissioner of Mental Hygiene, has the authority to operate a workshop for the mentally deficient pursuant to Chapters 5126 and 5127, Revised Code.

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**To: J. Warren Bettis, Columbiana County Pros. Atty., Lisbon, Ohio**
**By: William B. Saxbe, Attorney General, December 19, 1968**

Your recent request for my opinion reads as follows:

"There has been organized in our county a Board of Mental Retardation in accordance with Revised Code Section 5126.01.

"Our Board of Mental Retardation has been advised by the State Health Department that we must incorporate a non-profit corporation to operate our workshop for the mentally retarded. Their demands are claimed to be mandatory.

"Our County Board of Mental Retardation is at the present time operating the school for the mentally retarded as well as the workshop and all parties in this county appear to be satisfied with the Board of Mental Retardation operating both agencies. The board's thinking is that to incur the expense of incorporation and the creation of another agency to operate the workshop only, is not only a duplication of work but completely unnecessary in the eyes of the law.

"The next to the last paragraph in Revised Code Section 5126.03 reads as follows: 'Any county board of mental retardation may enter into a contract with another such board of another county or with a public or nonprofit agency or organization of the same or another county, to provide the training center, workshop facilities and services authorized in section 5127.01 of the Revised Code, upon such terms as may be agreeable.' This appears to the board to be permissive rather than mandatory of the use of the word may in the statute.

"My question, therefore, is:

"1. Is it mandatory that the Board of Mental Retardation or other individuals incorporate a nonprofit corporation to operate the workshop in order to receive funds from the State assuming all other requirements are met."

The powers and duties of a County Board of Mental Retardation are set out in Section 5126.03, Revised Code, which provides in pertinent part:

"The county board of mental retardation, subject to the rules, regulations, and standards of the commissioner of mental hygiene shall:

"(A) Administer and supervise sections 5127.01 to 5127.04, inclusive, of the Revised Code and exercise such powers and duties as prescribed by the commissioner;

"* * * * * * * * *

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

"* * * * * * * * *

"Any county board of mental retardation may enter into a contract with another such board of another county or with a public or nonprofit agency or organization of the same or another county to provide the training center, workshop facilities and services authorized in section 5127.01 of the Revised Code, upon such terms as may be agreeable.

"* * * * * * * * *"

Clearly the statute provides for the administration and supervision of Sections 5127.01 to 5127.04, inclusive, Revised Code, as the primary responsibility of the County Board of Mental Retardation. The board has authority in subsection (C) as quoted above to operate a training center or workshop as provided in Section 5127.01, Revised Code.

However, Section 5127.01, Revised Code, places the ultimate authority for the operation of such a training center with the commissioner of mental hygiene by providing in part:

"* * * The commissioner [of mental hygiene] shall * * * decide all questions relative or incident to the establishment and operation of each training center or workshop, * * *"

I find no authority for an intervention by the State Department of Health with respect to the operation of a workshop facility pursuant to Sections 5127.01 to 5127.04, inclusive, of the Revised Code.

Therefore, it is my opinion and you are hereby advised that the County Board of Mental Retardation, with the concurrence of the Commissioner of Mental Hygiene, has the authority to operate a workshop for the mentally deficient pursuant to Chapters 5126 and 5127, Revised Code.

## OPINION NO. 68-171

**Syllabus:**

A board of county commissioners is without authority to contract with a private firm to render clerical services when said services fall directly within a job category specifically assigned by Chapter 143, Revised Code, to members of the classified civil service.

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**To: Fred V. Skok, Lake County Pros. Atty., Painesville, Ohio**
**By: William B. Saxbe, Attorney General, December 19, 1968**

I am in receipt of your request for my opinion wherein you describe the following situation. The Lake County Clerk of Courts employed a number of individuals from a private secretarial agency known as "Kelly Girls" to perform clerical functions and for other secretarial purposes required by the clerk. When the county auditor questioned the validity of this arrangement, the county commissioners by resolution contracted directly with the secretarial agency. In return for the clerical employees required by the clerk's office, the county commissioners agreed to pay a set amount to the agency, who would in turn pay their own employees working in the clerk's office. The auditor, however, refused to certify the bills submitted by the agency as he maintains the commissioners' action was unauthorized by law. The question therefore arises as to whether the commissioners may fill clerical vacancies in the clerk's office by a personal service contract with a private secretarial agency.

I note from your request that the duties performed for the clerk of courts under the contract by the employees provided by the private agency are primarily clerical in nature and are performed in the clerk's office under the direct supervision of the clerk. Section 143.01, Revised Code, places all offices and positions of trust or employment in the service of the county in the Civil Service. Clearly therefore, the positions now occupied by the employees of the secretarial agency are such that would ordinarily be occupied by county civil service employees. It can only follow that the real issue is whether or not the county commissioners have the power to contract with a person or persons to render personal services when said service falls directly within a job category specifically assigned by the Civil Service laws of Ohio to members of the Civil Service.

Section 10, Article XV of the Ohio Constitution provides:

> "Appointments 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."

Section 143.03, Revised Code, provides in pertinent part:

> "No person shall be appointed * * * as an officer or employee in the civil service, in any manner or by any means other than those prescribed in sections 143.01 to 143.48, inclusive, of the Revised Code, and the rules of the director of state personnel or the municipal civil service commission within their respective jurisdictions."

Section 143.08, Revised Code, outlines the procedures by which public employees are appointed to civil service positions. I find no authorization in this section for the method utilized by the Lake County Commissioners to fill clerical positions in the Lake County Clerk of Courts' office.

However, you point out in your request for my opinion that the appointing authority was unable to locate qualified personnel

to perform the clerical functions under discussion. Therefore, further inquiry must be undertaken to determine whether the means undertaken by the commissioners to fill the positions are authorized under the code.

Section 143.23, Revised Code, authorizes emergency appointments to civil service employment by permitting provisional employees to fill classified positions without competitive exams; however, no authority is granted by this section to fill positions normally held by classified civil service personnel by a personal service contract between an appointing authority and a private agency. Clearly, therefore, Section 143.23, supra, is inapplicable to the situation you describe, for although an emergency situation appears to exist, the county commissioners have not appointed provisional employees as provided by this section, but instead, have permitted a private firm to hire and provide the required clerical help.

Further research of Chapter 143, Revised Code, indicates that the only possible authorization for the commissioners' act would come from Section 143.10 (F), Revised Code, which provides in pertinent part:

> "(F) * * * Sections 143.09 and 143.10 of the Revised Code do not repeal any authority of any department or public official to contract with or fix the compensation of professional persons who may be employed temporarily for work of a casual nature or for work on a project basis."

Thus it would appear that the validity of the contract depends upon the authority of the county commissioners so to act.

It is well established in Ohio that the board of county commissioners being an instrumentality of the state government has only those powers as are conferred by law. Many cases could be cited in support of this proposition, but it is deemed sufficient to quote from the statement of Matthias, J. in the case of Elder v. Smith, 103 Ohio St. 369 (1921), at page 370, where it is stated:

> "It has long been settled in this state that the board of county commissioners has such powers and jurisdiction, and only such as are conferred by statute. * * *"

In reviewing Chapter 307, Revised Code, which outlines the powers and duties of the various boards of county commissioners, I find no statutory authorization which would permit the county commissioners to contract with a private agency to provide clerical and secretarial personnel to fill positions ordinarily held by classified civil service employees. The powers and duties are set forth in Sections 307.14 to 307.19, inclusive, of the Revised Code, and there is no statutory authorization in these sections which would permit the county commissioners to fill jobs normally held by members of the civil service by entering into personal service contracts with a private firm to provide clerical assistance regardless of the circumstances.

I can only conclude that the Lake County Board of County Commissioners exceeded their statutory authority by contracting

for these particular personal services. Chapter 143, supra, is clear. Appointing authorities are directed to appoint only those applicants qualified under said chapter to positions in the civil service. Although Section 143.10 (F), supra, does not repeal any authority of an appointing authority to contract for temporary work of a casual nature, there is nothing in Chapter 307, supra, that would manifest an intention by the legislature permitting the county commissioners to contract with a private firm whereby said firm would provide clerical help to fill positions ordinarily held by civil service employees.

Accordingly, it is my opinion and you are hereby advised that a board of county commissioners is without authority to contract with a private firm to render clerical services when said services fall directly within a job category specifically assigned by Chapter 143, Revised Code, to members of the classified civil service.

## OPINION NO. 68-172

**Syllabus:**

In the absence of specific statutory authority the board of trustees of the Police and Firemen's Disability and Pension Fund is without authority to change the disability classification of a member who is receiving such benefit.

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**To: Franklin A. Kropp, Exec. Secretary, Police and Firemen's Disability and Pension Fund**
**By: William B. Saxbe, Attorney General, December 30, 1968**

Before me is your request for my opinion wherein the following questions are set forth:

> "1. Does the Pension Board have authority to re-classify a man already placed on a certain type of disability benefits by a local pension board prior to January 1, 1967 to another classification or type of disability benefit?
>
> "2. May the Pension Board change the disability classification of a man placed on a certain type of disability benefit by the statewide Pension Board since January 1, 1967, the action of a local pension board not being involved?"

In substance the question is the authority of the board of trustees of the Police and Firemen's Disability and Pension Fund to reclassify a member who is receiving partial disability benefits to the status of permanent and total disability to the end that benefits payable to the member would be increased. The question is twofold in that some members of the fund were awarded disability benefits by local pension funds prior to such funds being superseded by the state system on January 1, 1967.

First considering those members who were awarded partial disability benefits by the board of trustees of the Police and Firemen's Disability and Pension Fund subsequent to January 1, 1967, and who now seek to be reclassified as permanently and totally disabled, your attention is directed to Section 742.37 (C), Revised Code, which provides in part as follows:

> "(C) Members of the fund who have not elected to receive benefits and pensions from a police relief and pension fund or a firemen's relief and pension fund in accordance with the rules and regulations of such fund in force on April 1, 1947, shall receive pensions and benefits in accordance with the following provisions.
>
> "* * * * * * * * *
>
> "(2) A member of the fund who is permanently and totally disabled as the result of the performance of his official duties as a member of a police or fire department of a municipal corporation or a fire department of a township, shall be paid annual disability benefits until death, payable in twelve monthly installments, in an amount equal to sixty-six per cent of his annual salary for the last year he was in the active service of such police or fire department.
>
> "(3) A member of the fund who is partially disabled as the result of the performance of his official duties as a member of a police or fire department of a municipal corporation or a fire department of a township, and such disability prevents him from performing those duties and impairs his earning capacity, shall be paid monthly disability benefits in an amount to be fixed by the board. The board may increase or decrease such monthly benefits whenever the impairment of the member's earning capacity warrants an increase or decrease, but in no event shall a monthly benefit paid to such member exceed fifty per cent of his average monthly salary for the five calendar years during which his total annual salary as a member of said police or fire department was the greatest. Each such member who has completed twenty-five or more years of active service in the department shall receive annual disability benefits, payable in twelve monthly installments, in an amount equal to two per cent of his average annual salary for the five calendar years during which his total annual salary as a member of said police or fire department was the greatest multiplied by the number of years he was in the active service of such department, or an annual disability benefit of

> fifteen hundred dollars whichever amount is the greater. Such annual disability benefit shall not exceed sixty-six per cent of the member's average annual salary for the five calendar years during which his total annual salary as a member of said police or fire department was the greatest.
>
> * * * * * * * * *"

In section 742.37 (C) (3), supra, the General Assembly provided that a member with less than twenty-five years of service who is partially disabled as the result of the performance of his official duties may receive benefits not to exceed 50% of his average monthly salary for the five calendar years during which his total annual salary was the greatest, whereas a member who has completed twenty-five or more years of service may receive not more than 66% of such average annual salary.

Accordingly, it is apparent that the General Assembly intended to grant greater benefits to a member who is partially disabled and who has twenty-five or more years of service than to a member with less than twenty-five years of service.

Upon examination of Section 742.37 (C) (2), supra, it is noted that a member who is partially disabled and who has more than twenty-five years of service may receive benefits as a percentage of salary equal to that received by a member who is permanently and totally disabled. That subsection provides that a member who is permanently and totally disabled as the result of the performance of his official duties shall receive annual disability benefits in an amount equal to 66% of his annual salary for the last year of active service regardless of the number of years of service. There is no provision for the partially disabled member with less than twenty-five years of service to be awarded the same percentage of salary as may be awarded a member who is permanently and totally disabled or as may be awarded a member with twenty-five or more years of service who is partially disabled.

Furthermore, upon examination of Section 742.37, Revised Code, I find no provision for changing a partial disability awarded to one of permanent and total disability. The determination of disability, partial or permanent and total, must be made by the board when the member originally makes application for disability benefits.

Considering now those persons who were awarded disability benefits by local boards prior to January 1, 1967, your attention is directed to Section 742.37 (A), Revised Code, which provides as follows:

> "Persons who were receiving benefit or pension payments from a police relief and pension fund, established under section 741.32 of the Revised Code, or from a firemen's relief and pension fund, established under section 521.02 or 741.02 of the Revised Code, at the time the assets of such fund were transferred to the police and firemen's disability and pension fund, as provided by section 742.26 of the Revised Code, shall receive benefit and pension payments from the police and firemen's disabil-

> ity and pension fund in the same amount and subject to the same conditions as such payments were being made from such fund on the date of such transfer."
>
> (Emphasis supplied)

Accordingly, the General Assembly charged the board of trustees of the Police and Firemen's Disability and Pension Fund with the duty to continue making pension payments subject to the same conditions as payments were being made by the local boards at the time the assets of the local funds were transferred on January 1, 1967.

One of the conditions under which pension benefits had been awarded and were being paid by the local boards was based on a determination by the local boards as to whether the recipient should be placed on partial disability or permanent and total disability. Pursuant to the provisions of Section 742.37 (A), supra, the board of trustees of the Police and Firemen's Disability and Pension Fund is without authority to alter the conditions under which the local board had awarded benefits, and may not reclassify the type of disability benefit.

Therefore, it is my opinion and you are hereby advised, that in the absence of specific statutory authority the board of trustees of the Police and Firemen's Disability and Pension Fund is without authority to change the disability classification of a member who is receiving such benefit.