December 20, 2007

The Honorable Gary L. Lammers
Putnam County Prosecuting Attorney
336 East Main Street, Suite B
Ottawa, Ohio 45875

SYLLABUS: 2007-046

Pursuant to R.C. 2744.01(B), neither a freeholder called by the county sheriff to appraise real property under R.C. 2329.17 nor an auctioneer hired by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 is a county employee for purposes of R.C. 2744.03(A)(1) and R.C. 2744.08. (1940 Op. Att'y Gen. No. 2521, vol. I, p. 681, syllabus, paragraph one, overruled; 1934 Op. Att'y Gen. No. 3319, vol. II, p. 1465, overruled on the basis of statutory amendment.)

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December 20, 2007

OPINION NO. 2007-046

The Honorable Gary L. Lammers
Putnam County Prosecuting Attorney
336 East Main Street, Suite B
Ottawa, Ohio 45875

Dear Prosecutor Lammers:

You have requested an opinion whether a freeholder called by the county sheriff to appraise real property under R.C. 2329.17 or an auctioneer hired[1] by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 is a county employee for purposes of R.C. 2744.03(A)(1) and R.C. 2744.08. Based upon the definition of employee set forth in R.C. 2744.01(B), such freeholders and auctioneers are not county employees for purposes of R.C. 2744.03(A)(1) and R.C. 2744.08.

Use of Freeholders and Auctioneers to Conduct Appraisals and Auctions of Real Property

Before answering your specific question, it is useful to review the authority of a county sheriff to use freeholders and auctioneers when conducting appraisals and auctions of real

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[1] From the information provided in your letter, it appears that the auctioneer is appointed by the county sheriff in accordance with an order issued by a court pursuant to R.C. 2335.021. It is, therefore, assumed, for the purpose of this opinion, that the auctioneer is not employed by the sheriff as a deputy sheriff or in some other capacity. *See generally* R.C. 311.04(B)(1) ("the sheriff may appoint, in writing, one or more deputies"); R.C. 325.17 (a county sheriff "may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for [his office], shall fix the compensation of those employees and discharge them, and shall file certificates of that action with the county auditor"); 1940 Op. Att'y Gen. No. 2521, vol. I, p. 681, at 683 ("[i]f a licensed auctioneer possesses the necessary qualifications, the sheriff under the authority of [G.C. 2830 (now R.C. 311.04)] might appoint him a deputy and assign him the duty of conducting judicial sales").

property levied upon by execution[2] under R.C. Chapter 2329. R.C. 2329.01 declares that real property that is not exempt by law "shall be subject to the payment of debts, and liable to be taken on execution and sold as provided in [R.C. 2329.02-.61]." When execution is levied upon real property by a county sheriff under R.C. Chapter 2329, the sheriff is required to have the real property appraised and sold at auction.[3] *See* R.C. 2329.091(H); R.C. 2329.17; R.C. 2329.18.

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[2] R.C. 2327.01 defines "execution" as "a process of a court, issued by its clerk, and directed to the sheriff of the county." *See* Ohio R. Civ. P. 69 ("[p]rocess to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be as provided by law"). *But see generally* R.C. 311.08(A) ("[i]n an action in which the sheriff is a party, or is interested, process shall be directed to and executed by a person appointed by the court of common pleas or a judge of the court of common pleas"); R.C. 2329.091(E) ("[t]he court shall appoint a levying officer to immediately and simultaneously execute the writ of execution and serve the notice and the hearing request form required by [R.C. 2329.091(A)] upon the judgment debtor. The levying officer shall be the bailiff, a deputy bailiff, or an ex officio deputy bailiff of the court as specified in [R.C. Chapter 1901] or another chapter of the Revised Code, or the sheriff of the appropriate county. Notwithstanding any contrary provision of the Revised Code, if the bailiff, deputy bailiff, ex officio deputy bailiff, or sheriff is not able to perform the duties of the levying officer in accordance with this section, the court, upon application by the judgment creditor, shall appoint a disinterested person to serve as the levying officer"). Pursuant to R.C. 2327.02, there are three kinds of executions:

> (A) Against the property of the judgment debtor, including orders of sale;
> (B) Against the person of the judgment debtor;
> (C) For the delivery of the possession of real property, including real property sold under orders of sale.

[3] If a judgment debtor redeems real property levied upon by execution under R.C. Chapter 2329 prior to an appraisal or auction of the real property, a county sheriff is not required to conduct the appraisal or auction. *See generally* R.C. 2329.33 ("[i]n sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court of common pleas to which such execution or order is returnable, the amount of the judgment or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent annum on the purchase money from the day of sale to the time of such deposit, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim").

In addition, a county sheriff is not required to conduct an appraisal of real property levied upon by execution under R.C. Chapter 2329 when R.C. 2329.22 or R.C. 2329.25 applies. R.C.

See generally, e.g., R.C. 3123.74(A) ("[t]o obtain a sale of property subject to a lien established under [R.C. 3123.66-.68], a child support enforcement agency shall file, with the appropriate court of the county in which the property is located, as described in [R.C. 3123.741], a complaint stating that the agency has obtained a lien on real and personal property of the obligor that is located in the county and that the agency is entitled to have the property sold to obtain child support that is in arrears and subsequently overdue and asks the court to issue an order that the property be sold by an execution sale in accordance with [R.C. Chapter 2329]").

In order to appraise real property levied upon by execution under R.C. Chapter 2329, a county sheriff is required to call an inquest of freeholders:

> When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money.

R.C. 2329.17. When the county sheriff receives the estimate of the value of real property from the freeholders, the sheriff is required to deposit a copy of it with the clerk of the court from which the writ issued, and immediately advertise and sell at auction the real property in conformity with R.C. 2329.01-.61. R.C. 2329.18.

Under R.C. 2329.151, the auction of real property levied upon by execution under R.C. Chapter 2329 is to be conducted personally by an officer of the court or by an auctioneer licensed under R.C. Chapter 4707. R.C. 2335.021 provides further that any court of record may appoint an auctioneer licensed under R.C. Chapter 4707 to conduct an auction of real property required to be sold by an officer of the court. Pursuant to this authority, a court may order a county sheriff to hire an auctioneer licensed under R.C. Chapter 4707 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329.[4] *See generally* R.C. 311.07(A)

2329.22 provides that "[a]ll lands, the property of individuals, indebted to the state for debt, taxes, or in any other manner shall be sold without valuation for the discharge of such debt or taxes." R.C. 2329.25 states further that, "[i]f the property of a clerk of the court of common pleas, sheriff, coroner, county court judge, or constable, or of a collector of state, county, municipal corporation, or township taxes, is levied on, for or on account of money by him collected or received in this official capacity, the property so levied on shall be sold without valuation."

[4] The first syllabus paragraph of 1940 Op. Att'y Gen. No. 2521, vol. I, p. 681 concluded that "[a] sheriff may employ an auctioneer to conduct judicial sales of real estate *only by appointing such auctioneer as a deputy sheriff*." (Emphasis added.) The opinion reached this conclusion because the Attorney General at the time was "unable to find any express power

("[t]he sheriff shall attend upon the court of common pleas…. In the execution of official duties of the sheriff, the sheriff may call to the sheriff's aid such persons or power of the county as is necessary"); R.C. 311.08(A) ("[t]he sheriff shall, except as provided in division (B) of this section, execute every … order … directed to him by a proper and lawful authority of this state"); *Ingham v. Lindemann*, 37 Ohio St. 218, 221-22 (1881) ("[a] trustee, whose duty it is under the direction of a court to make sale of property, should perform the duties of auctioneer himself, unless in the opinion of the court the services of a professional auctioneer are deemed necessary…. It may be, no doubt, that peculiar circumstances will justify, in some cases, the employment of an auctioneer; but in such cases, the authority to make the employment should be obtained from the court directing the sale"); *Cole v. Raymore*, 31 Ohio Law Abs. 254, 256, (Ct. App. Marion County 1940) ("the sheriff could lawfully, as he did, employ an auctioneer to conduct a public sale of real estate to the point of reporting it to the sheriff or a deputy, for return of the order of sale"). *See generally also* 1957 Op. Att'y Gen. No. 969, p. 408 (syllabus, paragraph one) ("[a]n administrator in conducting a judicial sale of real estate at public sale may employ an auctioneer for a fee when such employment is authorized or approved by the court").

An Independent Contractor Is Not a County "Employee" for Purposes of R.C. Chapter 2744

Let us now consider your specific question, which asks whether a freeholder called by the county sheriff to appraise real property under R.C. 2329.17 or an auctioneer hired by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 is a county employee for purposes of R.C. 2744.03(A)(1) and R.C. 2744.08.

R.C. Chapter 2744 generally establishes the scope of tort liability for a political subdivision and its employees. Under this chapter, a political subdivision is immune from liability when an injury, death, or loss to person or property is caused by an employee of the political subdivision engaged in the performance of a judicial or quasi-judicial function:

> (A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

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authorizing the sheriff to employ an auctioneer to conduct judicial sales for the sale of real estate" or "that it [was] necessarily implied that an auctioneer be so employed to conduct such sales." *Id.* at p. 682. However, in light of the current language of R.C. 2335.021 authorizing a court to order a county sheriff to appoint an auctioneer licensed under R.C. Chapter 4707 to conduct an auction of real property to be sold by the sheriff, we overrule 1940 Op. Att'y Gen. No. 2521, vol. I, p. 681 to the extent that it concluded that an auctioneer hired by the sheriff to conduct a judicial sale of real property is required to be deputized.

> (1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

R.C. 2744.03(A)(1).

In addition, R.C. 2744.08 authorizes a political subdivision to secure liability insurance and establish and maintain a self-insurance program for the political subdivision and its employees as follows:

> (A)(1) A political subdivision may use public funds to secure insurance with respect to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function…..
>
> ….
>
> (2)(a) Regardless of whether a political subdivision procures a policy or policies of liability insurance pursuant to division (A)(1) of this section or otherwise, the political subdivision may establish and maintain a self-insurance program relative to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function.

Because a county is a political subdivision for purposes of R.C. Chapter 2744, R.C. 2744.01(F), the county is immune from liability when an injury, death, or loss to persons or property is caused by an employee of the county engaged in the performance of a judicial or quasi-judicial function, R.C. 2744.03(A)(1), and the county may secure liability insurance and establish and maintain a self-insurance program for the county and its employees, R.C. 2744.08.

For purposes of R.C. 2744.03(A)(1) and R.C. 2744.08, an "employee" is defined in R.C. 2744.01(B) as follows:

> "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. *"Employee" does not include an independent contractor* and does not include any individual engaged by a school district pursuant to [R.C. 3319.301]. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to [R.C. 2951.02] or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to [R.C. 2152.19

> or R.C. 2152.20] to perform community service or community work in a political subdivision. (Emphasis added.)

R.C. 2744.01(B) thus explicitly provides that a person who is in the service of the county as an independent contractor is not a county employee for purposes of R.C. 2744.03(A)(1) and R.C. 2744.08. *See generally* 1987 Op. Att'y Gen. No. 87-102 at 2-682 ("[t]he defense and indemnification provisions of R.C. 2744.07 are thus designed to protect only persons who are officers, agents, employees, or servants of political subdivisions, and not to extend to independent contractors").

Freeholders and Auctioneers Used by a County Sheriff to Conduct Appraisals and Auctions of Real Property Levied upon by Execution under R.C. Chapter 2329 Are Independent Contractors

The Ohio Supreme Court has held that the relationship of employer and independent contractor is created when "the manner or means of doing the work or job is left to one who is responsible to the employer only for the result." *Gillum v. Indus. Comm'n of Ohio*, 141 Ohio St. 373, 48 N.E.2d 234 (1943) (syllabus, paragraph two). As explained in *Councell v. Douglas*, 163 Ohio St. 292, 126 N.E.2d 597 (1955) (syllabus, paragraph one):

> The relationship of principal and agent or master and servant is distinguished from the relationship of employer and independent contractor by the following test: Did the employer retain control of, or the right to control, the mode and manner of doing the work contracted for? If he did, the relationship is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor.

Accord Bostic v. Connor, 37 Ohio St. 3d 144, 145-46, 524 N.E.2d 881 (1988); *Gillum v. Indus. Comm'n of Ohio* (syllabus, paragraph two); *Miller v. Metro. Life Ins. Co.*, 134 Ohio St. 289, 291, 16 N.E.2d 447 (1938); *Indus. Comm'n of Ohio v. Laird*, 126 Ohio St. 617, 186 N.E. 718 (1933) (syllabus, paragraph four). Accordingly, for purposes of R.C. 2744.01(B), the relationship of employer and independent contractor exists when the employer does not retain control of, or the right to control, the mode and manner in which the services are performed. *See generally Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 218 (6th Cir. 1992) ("Ohio courts distinguish between employees and independent contractors by determining whether the employer has the right to control the manner in which the work is performed"); *Crossley v. Esler*, 1994 Ohio App. LEXIS 5185, at *4-5 (Franklin County Nov. 17, 1994) (the right-to-control test is used in determining whether a worker is an employee or an independent contractor for purposes of R.C. 2744.01(B)); 1987 Op. Att'y Gen. No. 87-102 at 2-682 through 2-684 (the test set forth in *Councell v. Douglas* is to be used when determining whether a person is an employee or independent contract for purposes of R.C. 2744.01(B)); 1987 Op. Att'y Gen. No. 87-082 at 2-548 and 2-549 (same as the previous parenthetical).

Generally, whether a person performs his services as a "county employee or an independent contractor is primarily a factual issue, which [the Attorney General] cannot properly resolve by way of opinion." 1987 Op. Att'y Gen. No. 87-082 at 2-549; *accord* 1987 Op. Att'y Gen. No. 87-102 at 2-684; 1987 Op. Att'y Gen. No. 87-073 at 2-468; 1983 Op. Att'y Gen. No. 83-037 at 2-140 and 2-141. *See generally Gillum v. Indus. Comm'n of Ohio* (syllabus, paragraph two) ("[w]hether one is an independent contractor or in service depends upon the facts of each case"). In this instance, however, several factors[5] strongly support the conclusion that freeholders called by the county sheriff to appraise real property under R.C. 2329.17 and auctioneers hired by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 are independent contractors for purposes of R.C. 2744.01(B). *See generally Bostic v. Connor*, at 146 ("[g]enerally, where the evidence is not in conflict or the facts are admitted, the question of whether a person is an employee or an independent contractor is a matter of law to be decided by the court"). Indeed, it is significant that factors such as the length of time that a freeholder or auctioneer is required to perform his task, the method of payment, and the extent of control exercised by the county over the details of the task indicate that the county does not retain control of, or the right to control, the mode and manner in which the freeholder or auctioneer performs his services. *See generally* note five, *supra* (length of employment, method of payment, and control over the details of the work are factors used in making the right-to-control determination).

Pursuant to R.C. 2329.17 and R.C. 2335.021, freeholders are called to appraise real property and an auctioneer is hired to conduct an auction of the real property when the county

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[5] In *Bostic v. Connor*, 37 Ohio St. 3d 144, 146, 524 N.E.2d 881 (1988), the Ohio Supreme Court set forth various factors to consider when determining whether a person performs his services as an employee or independent contractor:

> The determination of who has the right to control must be made by examining the individual facts of each case. The factors to be considered include, but are certainly not limited to, such indicia as who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes travelled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts.

Accord Gillum v. Indus. Comm'n of Ohio, 141 Ohio St. 373, 381-82, 48 N.E.2d 234 (1943); Restatement (Second) of Agency § 220 (1958). *See generally Cole v. Am. Cmty. Servs.*, 2006 U.S. Dist. LEXIS 75431, at *13 (S.D. Ohio Oct. 17, 2006) ("Ohio courts also generally apply the Restatement (Second) of Agency § 220 factors to determine whether an individual is an agent or independent contractor" (footnote omitted)), *aff'd*, 2007 U.S. App. LEXIS 22938 (6th Cir. Sept. 25, 2007).

sheriff needs their services in a case to facilitate the sale of real property levied upon by execution under R.C. Chapter 2329. R.C. 2329.17 states that, "[w]hen execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view." R.C. 2335.021 further authorizes a county sheriff to hire an auctioneer in accordance with a court order to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 when the services of an auctioneer are needed in a case.

For performing their services in a case, freeholders and auctioneers are paid a set fee and reimbursed for various expenses by the purchaser of the real property sold or the judgment debtor. *See* R.C. 311.19 ("[i]n all cases in which an attachment is issued, the freeholders required to be called by the sheriff to appraise property shall be allowed such fees for their services as the court directs"); R.C. 2329.19 ("[u]pon the return provided for in [R.C. 2329.17], if it appears by the inquisition that two-thirds of the appraised value of the lands and tenements levied upon is sufficient to satisfy the execution, with costs, the judgment on which the execution issued shall not operate as a lien on the residue of the debtor's estate to the prejudice of any other judgment creditor"); R.C. 2329.21 ("[i]f the sum bid by the purchaser for the real estate sold under [R.C. 2329.20] relating to the enforcement of junior liens is insufficient to pay the costs and allowance which the court has determined prior to such sale should be paid out of the proceeds thereof, pursuant to the terms of the mortgage or lien sought to be enforced, then the purchaser, in addition to the amount of his bid, must pay a sum which with the amount so bid will be sufficient to pay the costs and allowances"); R.C. 2329.33 (a judgment debtor must pay costs when he redeems real property levied upon by execution under R.C. Chapter 2329); R.C. 2335.01 ("[e]ach person called by an officer to appraise real or personal property, on execution, replevin, or attachment, or to fix the value of exempt property shall receive not more than ten dollars per parcel and necessary expenses, provided, that in the appraisal of real estate the court may fix compensation at more than ten dollars per parcel"); R.C. 2335.02 ("[i]n any cause, matter, or proceeding arising in any court of record, where appraisers, commissioners, or arbitrators are appointed by such court to make or procure an appraisement or valuation of any property, real or personal, such appraisers, commissioners, or arbitrators shall receive, on application to such court, such compensation as the court deems reasonable and proper in addition to the amount specified by law and such compensation shall be taxed in the costs of such cause, matter, or proceeding in the same manner as other costs are now taxed"); R.C. 2335.021 (an "auctioneer shall receive such compensation and reimbursement for the expenses of advertising [a] public auction as the court finds reasonable and proper. Such compensation and advertising expenses shall be charged as costs in the action or proceeding in which such sale is ordered").

Thus, under R.C. 2329.17 and R.C. 2335.021, freeholders are called and auctioneers are hired by the county sheriff per case to perform a specific task for the county sheriff. Freeholders prepare appraisals for the sheriff while auctioneers conduct auctions. Freeholders and auctioneers are not paid by the hour for their services in a case. Instead, they are paid a set fee

for their services by the purchaser of the real property sold or the judgment debtor.[6] *See* R.C. 311.19; R.C. 2335.01; R.C. 2335.02; R.C. 2335.021.

Once a freeholder or auctioneer has completed his task in a case, the services of the freeholder or auctioneer are no longer needed in that case. At that time, the freeholder or auctioneer no longer performs services for the county unless he is called or hired by the county sheriff in another case. Hence, the relationship between the county sheriff and a freeholder called by the county sheriff to appraise real property under R.C. 2329.17 or an auctioneer hired by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 exists temporarily. It lasts only as long as it takes for a freeholder to make an appraisal or an auctioneer to conduct an auction in a case.

Moreover, a county sheriff does not have the authority to control the details of the work of freeholders or auctioneers. Freeholders are required to exercise their discretion and perform an impartial appraisal of real property when called to do so and the county sheriff is required to deposit that appraisal with the appropriate court. R.C. 2329.17-.18. An auctioneer is also vested with discretion in determining the manner in which an auction is to be conducted, provided the auctioneer exercises his discretion in accordance with the terms of the statutory scheme appearing in R.C. Chapter 2329. *See generally* Restatement (Second) of Agency § 1 cmt. e (1958) (an auctioneer employed either for a single transaction or for a series of transactions is an independent contractor as to his physical activities); Restatement (Second) of Agency § 14N cmt. a (1958) ("selling agencies are independent contractors as the term is used in the Restatement of this Subject, since they are contractors but, although employed to perform services, are not subject to the control or right of control of the principal with respect to their physical conduct in the performance of the services").

A review of the statutory scheme creating and governing the relationship between the county sheriff and freeholders and auctioneers thus reveals the following: (1) the relationship is temporary in its duration and for the purpose of accomplishing a specific task; (2) the freeholders and auctioneers are paid a set fee for their services; and (3) the county does not exercise control over the details of the work performed by a freeholder or auctioneer. In light of these facts, it reasonably appears that the county does not retain control of, or the right to control, the mode and manner in which freeholders and auctioneers perform their services and, as such, freeholders called by the county sheriff to appraise real property under R.C. 2329.17 and auctioneers hired by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct

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[6] On the basis of G.C. 3006 (now R.C. 2335.01), 1934 Op. Att'y Gen. No. 3319, vol. II, p. 1465 determined that appraisers are to be paid on a per diem basis, rather than for each appraisal performed. Because R.C. 2335.01 now requires appraisers to be paid per parcel, *see* 1935 Ohio Laws 488 (H.B. 74, approved June 4, 1935), we overrule that opinion to the extent that it is inconsistent with current law.

an auction of real property levied upon by execution under R.C. Chapter 2329 are independent contractors for purposes of R.C. 2744.01(B). *See generally* 1980 Op. Att'y Gen. No. 80-098 at 2-394 ("[i]n most instances an attorney is hired [by a township] to deal with a specific legal problem. He provides his own office and staff, and performs a particular job at a particular price. Therefore, an attorney will usually fall into the category of an independent contractor"); Restatement (Second) of Agency § 220 cmt. j (1958) (the time of employment and the method of payment are important when determining whether a person is an employee or independent contractor. "If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him. This is especially true if payment is to be made by the job and not by the hour"). *See generally also Councell v. Douglas* (syllabus, paragraph one) (if an employer "is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor").

As explained above, R.C. 2744.01(B) declares that an independent contractor is not an "employee" for purposes of R.C. Chapter 2744. Accordingly, since freeholders called by the county sheriff to appraise real property under R.C. 2329.17 and auctioneers hired by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 are independent contractors, it follows that, pursuant to R.C. 2744.01(B), such freeholders and auctioneers are not county employees for purposes of R.C. 2744.03(A)(1) and R.C. 2744.08.

We are aware that in certain instances the relationship between a county and independent contractor may constitute an agency relationship. *See* 1987 Op. Att'y Gen. No. 87-102 at 2-684; 1987 Op. Att'y Gen. No. 87-082 at 2-549; Restatement (Second) of Agency § 1 cmt. e (1958); Restatement (Second) of Agency § 2(3) (1958); Restatement (Second) of Agency § 2 cmt. b (1958); Restatement (Second) of Agency § 14N (1958). In such a situation the independent contractor is an agent for the county. *See Tanksley & Assocs. v. Willard Indus., Inc.*, 961 F. Supp. 203, 207 (S.D. Ohio 1997); *Berge v. Columbus Cmty. Cable Access*, 136 Ohio App. 3d 281, 301, 736 N.E.2d 517 (Franklin County 1999); Restatement (Second) of Agency § 2(3) (1958); Restatement (Second) of Agency § 2 cmt. b (1958); Restatement (Second) of Agency § 14N (1958); Restatement (Second) of Agency § 14N cmt. a (1958). It therefore could be argued that an independent contractor who is an agent for the county is a county employee for purposes of R.C. Chapter 2744 since the definition of "employee" set forth in R.C. 2744.01(B) includes an "agent … who is authorized to act and is acting within the scope of the … agent's … employment" for the county. *But see Crossley v. Esler*, 1994 Ohio App. LEXIS 5185, at *6 (Franklin County Nov. 17, 1994) (employee, as defined in R.C. 2744.01(B), "is not limited to 'servants' but includes all agents unless an independent contractor"); *see also Berge v. Columbus Cmty. Cable Access*, at 301 ("although 'agent' is included in the definition of 'person,' 'independent contractor' is not. R.C. 4112.01(A)(1). A distinction thus exists under the statute between an agent and an independent contractor").

The foregoing argument is not persuasive with respect to your specific inquiry, however, insofar as the freeholders and auctioneers in question do not act as fiduciaries for the county. *See*

generally Eyerman v. Mary Kay Cosmetics, Inc., at 219 (an "agent must be a fiduciary of the principal in matters within the scope of the agency"); Restatement (Second) of Agency § 13 (1958) ("[a]n agent is a fiduciary with respect to matters within the scope of his agency" (bold in original)). It is a fundamental tenet of agency law that an agency is a consensual fiduciary relationship arising from the "consent by one person to another that the other shall act on his behalf and subject to his control."[7] Restatement (Second) of Agency § 1(1) (1958) (bold in original); *accord Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 393 (1982); *Evans v. Ohio State Univ.*, 112 Ohio App. 3d 724, 744, 680 N.E.2d 161 (Franklin County 1996); 1988 Op. Att'y Gen. No. 88-056 at 2-270. *See generally* Restatement (Second) of Agency § 1 cmt. e (1958) ("'[a]gent' is a word used to describe a person authorized by another to act on his account and under his control").

Moreover, as explained in § 14N of the Restatement (Second) of Agency (1958), an independent contractor is an agent for this employer when the independent contractor is authorized to act on the employer's behalf and subject to the directions of the employer in performing his services:

> **One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor.**
>
> **Comment:**
>
> *a. Independent contractor as agent.* As stated in Section 2, "independent contractor" is a term which is antithetical to the word "servant",

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[7] The comment to § 1(1) of the Restatement (Second) of Agency (1958) elaborates upon the nature of an agency relationship, in part, as follows:

> *a.* The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control….
>
> *b. Agency a legal concept.* Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking….
>
> …. The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts.

> although not to the word "agent". In fact, most of the persons known as agents, that is, brokers, factors, attorneys, collection agencies, and selling agencies are independent contractors as the term is used in the Restatement of this Subject, since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of the services. *However, they fall within the category of agents. They are fiduciaries; they owe to the principal the basic obligations of agency: loyalty and obedience*…. Colloquial use of the term excludes independent contractor from the category of agent as a similar use excludes trustee, *but in both cases there is an agency if in the transaction which they undertake they act for the benefit of another and subject to his control*. Thus, salesmen as a group are divided into servants and non-servants, the latter falling into the class of independent contractors for the purpose of distinguishing them from others for whose physical conduct in the scope of employment the employer is responsible.
>
> *b. Non-agent independent contractor. A person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor*. He may be anyone who has made a contract and who is not an agent. The term is used colloquially to describe builders and others who have contracted to accomplish physical results not under the supervision of the one who has employed them to produce the results. (Emphasis added.)

Accordingly, an independent contractor is an agent for the county when the independent contractor is authorized by the county to act on its behalf and subject to the directions of the county in performing his services. *See Berge v. Columbus Cmty. Cable Access*, at 301; *Hensley v. New Albany Co.*, 1997 Ohio App. LEXIS 6004, at *10-12 (Franklin County Dec. 31, 1997); *see also Eyerman v. Mary Kay Cosmetics, Inc.*, at 219; Restatement (Second) of Agency § 14N (1958). *See generally* Restatement (Second) of Agency § 13 cmt. a (1958) ("[t]he agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking"); Restatement (Second) of Agency § 14 (1958) ("[a] principal has the right to control the conduct of the agent with respect to matters entrusted to him" (bold in original)); Restatement (Second) of Agency § 15 (1958) ("[a]n agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act" (bold in original)).

A review of the relationship between the county and freeholders called by the county sheriff to appraise real property under R.C. 2329.17 discloses that the freeholders do not act on behalf of the county and that the county does not have the right to control the freeholders while performing an appraisal. As stated earlier, freeholders are required to provide the county sheriff with impartial appraisals of real property. Because freeholders are required to act impartially, it reasonably follows that the county has no right to direct the manner by which the freeholders

perform their appraisals and freeholders do not act on behalf of the county while performing appraisals. Therefore, freeholders are not agents of the county for purposes of R.C. 2744.01(B).

Similarly, an auctioneer hired by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 does not act on the county's account. An auctioneer hired by the sheriff does not represent the county prior to or during an auction since the county is not the seller or buyer of the real property being sold at the auction. *See generally Pugh v. Chesseldine*, 11 Ohio 109, 124 (1841) (an auctioneer is the agent of the seller and buyer). The county sheriff merely retains an auctioneer's services to bring about the sale of real property levied upon by execution under R.C. Chapter 2329 for judgment creditors. Accordingly, an auctioneer does not act on behalf of the county when hired by a county sheriff to conduct an auction and, as such, the auctioneer is not an agent of the county for purposes of R.C. 2744.01(B).

Conclusion

In summary, it is my opinion, and you are hereby advised that, pursuant to R.C. 2744.01(B), neither a freeholder called by the county sheriff to appraise real property under R.C. 2329.17 nor an auctioneer hired by a county sheriff in accordance with a court order issued pursuant to R.C. 2335.021 to conduct an auction of real property levied upon by execution under R.C. Chapter 2329 is a county employee for purposes of R.C. 2744.03(A)(1) and R.C. 2744.08. (1940 Op. Att'y Gen. No. 2521, vol. I, p. 681, syllabus, paragraph one, overruled; 1934 Op. Att'y Gen. No. 3319, vol. II, p. 1465, overruled on the basis of statutory amendment.)

Respectfully,

MARC DANN
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