

OPINION NO. 2006-014**Syllabus:**

The Director of Job and Family Services is authorized: (1) to certify to the Attorney General, for collection pursuant to R.C. 131.02, any amounts of non-fraudulent unemployment compensation benefit overpayments required by order of the Director under R.C. 4141.35(B) to be repaid, if those amounts are not paid within forty-five days after payment is due; and (2) in this manner, to initiate legal action to recover non-fraudulent unemployment compensation benefit over-payments.

**To: Barbara Riley, Director Ohio Department of Job & Family Services,
Columbus, Ohio**

By: Jim Petro, Attorney General, March 17, 2006

We have received your request for a formal opinion concerning the author-

ity of the Ohio Department of Job and Family Services (ODJFS) to certify to the Ohio Attorney General claims for the collection under R.C. 131.02 of certain amounts due to the Director of Job and Family Services. The claims at issue are claims under R.C. 4141.35(B) for the recovery of unemployment compensation benefits paid to applicants who, for reasons other than fraudulent misrepresentation, were not entitled to the benefits. You have asked about the authority of ODJFS to initiate legal action to recover non-fraudulent unemployment compensation benefit overpayments.

For the reasons discussed below, we conclude that the Director of Job and Family Services is authorized: (1) to certify to the Attorney General, for collection pursuant to R.C. 131.02, any amounts of non-fraudulent unemployment compensation benefit overpayments required by order of the Director under R.C. 4141.35(B) to be repaid, if those amounts are not paid within forty-five days after payment is due; and (2) in this manner, to initiate legal action to recover non-fraudulent unemployment compensation benefit overpayments.

Authority of ODJFS to administer the unemployment compensation program and to recover non-fraudulent benefit overpayments

Ohio's unemployment compensation program is certified as part of the federal unemployment compensation program, and ODJFS, headed by the Director of Job and Family Services, is the state entity charged with administering Ohio's program. See 26 U.S.C.A. §§ 3301-3302, 3004, 3306(e) (West 2002 & Supp. 2005); R.C. 121.02(H); R.C. 4141.04; R.C. 4141.13. As part of its responsibilities, ODJFS performs functions relating to the collection of unemployment taxes from employers, the payment of unemployment compensation benefits, and the recovery of benefit overpayments. See, e.g., R.C. 4141.20; R.C. 4141.23; R.C. 4141.27; R.C. 4141.30; R.C. 4141.35.

The question at issue concerns instances in which, through some non-fraudulent error, unemployment benefits have been overpaid. R.C. 4141.35(B) governs the recovery of these overpayments. If an applicant for benefits, for reasons other than fraudulent misrepresentation, has been paid benefits to which the applicant was not entitled, the Director of Job and Family Services "shall ... by order ... require that such benefits be repaid to the director" or be withheld from benefits to which the applicant is or may become entitled, subject to limited exceptions. R.C. 4141.35(B); see *Parks v. Garnes*, 49 Ohio St. 2d 251, 254, 361 N.E.2d 1057 (1977) ("[t]he plain terms of the statute [R.C. 4141.35(B)] authorize the administrator [now the Director of Job and Family Services] to order nonfraudulent overpayments repaid or recouped by withholding from current or future entitled benefits of the applicant"); *Coles v. Administrator, Ohio Bureau of Employment Servs.*, No. 18106, 2000 Ohio App. LEXIS 1984, at *4 (Montgomery County May 12, 2000) (affirming the decision of the Ohio Unemployment Compensation Review Commission, stating that the plain terms of R.C. 4141.35(B) authorize the Administrator "to order non-fraudulent overpayments repaid," and ordering the recipient to repay benefits for which he was ineligible); *Acree v. Bd. of Review, Ohio Bureau of Employment Servs.*, No. 48714, 1985 Ohio App. LEXIS 5827, at *10 (Cuyahoga

County Feb. 28, 1985) (“the General Assembly, by the unambiguous language of R.C. § 4141.35(B), has granted the Administrator the power to recoup any payments made to which a claimant was not entitled”).¹

The Director is empowered to proceed to collect the amounts due under an order for the repayment of non-fraudulent overpayments, subject to the limitation set forth in division (B)(3) that, if the amounts required to be repaid under division (B) are not recovered within three years from the date the Director’s order became final, the Director is prohibited from initiating any further action to collect the

¹ R.C. 4141.35 states:

(B) If the director finds that an applicant for benefits has been credited with a waiting period or paid benefits to which the applicant was not entitled for reasons other than fraudulent misrepresentation, the director shall:

(1)(a) Within six months after the determination under which the claimant was credited with that waiting period or paid benefits becomes final pursuant to section 4141.28 of the Revised Code, or within three years after the end of the benefit year in which such benefits were claimed, whichever is later, by order cancel such waiting period and require that such benefits be repaid to the director or be withheld from any benefits to which such applicant is or may become entitled before any additional benefits are paid, provided that the repayment or withholding shall not be required where the overpayment is the result of the director’s correcting a prior decision due to a typographical or clerical error in the director’s prior decision, or an error in an employer’s report under division (G) of section 4141.28 of the Revised Code.

(b) The limitation specified in division (B)(1)(a) of this section shall not apply to cases involving the retroactive payment of remuneration covering periods for which benefits were previously paid to the claimant. However, in such cases, the director’s order requiring repayment shall not be issued unless the director is notified of such retroactive payment within six months from the date the retroactive payment was made to the claimant.

(2) The director may, by reciprocal agreement with the United States secretary of labor or another state, recover overpayment amounts from unemployment benefits otherwise payable to an individual under Chapter 4141. of the Revised Code. Any overpayments made to the individual that have not previously been recovered under an unemployment benefit program of the United States may be recovered in accordance with section 303(g) of the “Social Security Act” and sections 3304(a)(4) and 3305(f) of the “Federal Unemployment Tax Act,” 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311.

(3) If the amounts required to be repaid under division (B) of this section are not recovered within three years from the date the director’s order requiring payment became final, initiate no further action to collect such benefits and the amount of any benefits not recovered at that time shall be canceled as uncollectible. (Emphasis added.)

benefits, and the amount of benefits not recovered at that time must be canceled as uncollectible. R.C. 4141.35(B)(3). Provisions of division (D) direct the manner in which repayments received are credited to appropriate funds and accounts. R.C. 4141.35(D).

Certification of claims to the Ohio Attorney General for collection

R.C. 131.02 establishes the time frame and manner in which claims for amounts due to a state agency or department are to be certified to the Ohio Attorney General for collection. In this regard, R.C. 131.02(A) states:

Whenever any amount is payable to the state, the officer, employee, or agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury or into the appropriate custodial fund in the manner set forth pursuant to section 113.08 of the Revised Code. Except as otherwise provided in this division, if the amount is not paid within forty-five days after payment is due, the officer, employee, or agent shall certify the amount due to the attorney general, in the form and manner prescribed by the attorney general, and notify the director of budget and management thereof. In the case of an amount payable by a student enrolled in a state institution of higher education, the amount shall be certified within the later of forty-five days after the amount is due or the tenth day after the beginning of the next academic semester, quarter, or other session following the session for which the payment is payable. The attorney general may assess the collection cost to the amount certified in such manner and amount as prescribed by the attorney general. (Emphasis added.)

R.C. 131.02 thus requires that state officials responsible for administering a law under which amounts are payable to the state proceed to collect amounts due under the law. If an amount “is not paid within forty-five days after payment is due” the officials “shall certify the amount due to the attorney general,” subject to exceptions to the forty-five day period for certain amounts due from students. R.C. 131.02. Use of the word “shall” indicates that certification to the Attorney General, at the appropriate time, is mandatory. *See Dep’t of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992) (quoting *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1), as follows: “[i]n statutory construction, the word ‘may’ shall be construed as permissive and the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage”). R.C. 131.02 goes on to establish procedures for the collection of claims. R.C. 131.02(B)-(F).

There is no indication that the General Assembly intended the claim certification procedures set forth in R.C. 131.02 to be permissive guidelines rather than mandatory directives. To the contrary, it is evident that the General Assembly chose mandatory language to provide for an efficient and comprehensive collection proce-

ture to recover moneys due the state. *See, e.g.*, 1986 Op. Att’y Gen. No. 86-066, at 2-362 (“[t]o the extent that a witness, who has been paid witness fees and mileage in order to appear at an administrative hearing of the State Dental Board, fails to attend the hearing, . . . such fees and mileage are ‘payable to the state’ and must be collected pursuant to R.C. 131.02”). This literal reading of the plain language of R.C. 131.02 is consistent with the fact that the Attorney General, as the chief law officer for the state and all its departments, is designated by statute as the person with authority to provide legal representation to state officers, boards, departments, and institutions. R.C. 109.02; *see also* Ohio Const. art. III, § 1. Thus, compliance with R.C. 131.02 enables the state’s collection process to function effectively.

Question whether non-fraudulent unemployment compensation benefit overpayment claims are subject to R.C. 131.02

The language of R.C. 131.02 providing for the collection of claims by the Attorney General is written in broad and general terms that encompass amounts of non-fraudulent unemployment compensation benefit overpayments ordered paid by the Director of Job and Family Services pursuant to R.C. 4141.35(B). The Director of Job and Family Services is an officer of the State of Ohio, who is responsible for administering the unemployment compensation law and, in particular, the provisions of R.C. 4141.35(B). *See* R.C. 121.02(H); R.C. 121.03(E); R.C. 4141.04; R.C. 4141.13. Division (B) of R.C. 4141.35 provides that the Director “shall,” subject to certain exceptions, require that non-fraudulent benefit overpayments either be repaid or be withheld from benefits to which the applicant is or may become entitled. The Director is thus mandated to recover overpayments, either by ordering them repaid or by withholding them from other benefits. *See, e.g., Eastman v. Unemployment Comp. Bd. of Review*, No. 90-CA-15, 1991 Ohio App. LEXIS 1, at *12-13 (Champaign County Jan. 3, 1991) (“[p]ursuant to R.C. 4141.35(B)(1) the administrator shall require repayment of benefits to which the claimant was not entitled for reasons other than fraudulent misrepresentation.... Once the Administrator found out that the benefits were not due to the employee, he was required to get them back”); *Micciche v. Bureau of Review, Ohio Bureau of Employment Servs.*, No. 52087, 1986 Ohio App. LEXIS 9247, at *5 (Cuyahoga County Nov. 26, 1986) (“R.C. 4141.35(B) requires reimbursement of unemployment compensation benefits when an applicant receives funds to which he was not entitled”); *Hufeisen v. Giles*, No. CA 6364, 1979 Ohio App. LEXIS 10457, at *8 (Montgomery County Nov. 19, 1979) (stating that the Ohio statute does not follow the federal statute requiring that a state agency have authority to waive the repayment of amounts to which recipients were not entitled, and stating: “the Ohio General Assembly has mandated the administrator of the Ohio Bureau of Employment Services to require a recipient of benefits to repay those to which he was not entitled... If the General Assembly desires the Administrator to have the power to waive repayment, it must so state”); *see also Dep’t of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d at 534 (statutory use of “shall” is construed as mandatory in the absence of clear legislative intent to the contrary).

An order for repayment issued by the Director pursuant to R.C. 4141.35(B) specifies an amount that must be repaid to the Director and, thus, defines an amount

payable to the state for purposes of R.C. 131.02. *See* R.C. 4141.35(B)(3) (referring to “the date the director’s order requiring payment became final”). Therefore, amounts of non-fraudulent overpayments ordered repaid by the Director of Job and Family Services pursuant to R.C. 4141.35(B) are amounts that are payable to the state within the meaning of R.C. 131.02 and must either be collected by the Director or certified to the Attorney General for collection pursuant to R.C. 131.02. Accordingly, if an amount ordered paid under R.C. 4141.35(B) is not paid within forty-five days after payment is due, the Director is required by R.C. 131.02 to certify the amount payable to the Attorney General for collection.

Distinguishing divisions (A) and (B) of R.C. 4141.35

You have informed us that questions have arisen concerning the conclusion that the collection provisions of R.C. 131.02 are applicable to repayments required under division (B) of R.C. 4141.35 because of the distinctions between division (B) and division (A) of that section.²

Division (A) of R.C. 4141.35 governs actions to be taken when fraudulent

² Division (A) of R.C. 4141.35 states:

(A) If the director of job and family services finds that any fraudulent misrepresentation has been made by an applicant for or a recipient of benefits with the object of obtaining benefits to which the applicant or recipient was not entitled, and in addition to any other penalty or forfeiture under this chapter, then the director:

(1) Shall within four years after the end of the benefit year in which the fraudulent misrepresentation was made reject or cancel such person’s entire weekly claim for benefits that was fraudulently claimed, or the person’s entire benefit rights if the misrepresentation was in connection with the filing of the claimant’s application for determination of benefit rights;

(2) Shall by order declare that, for each application for benefit rights and for each weekly claim canceled, such person shall be ineligible for two otherwise valid weekly claims for benefits, claimed within six years subsequent to the discovery of such misrepresentation;

(3) By order shall require that the total amount of benefits rejected or canceled under division (A)(1) of this section be repaid to the director before such person may become eligible for further benefits, and shall withhold such unpaid sums from future benefit payments accruing and otherwise payable to such claimant. Effective with orders issued on or after January 1, 1993, if such benefits are not repaid within thirty days after the director’s order becomes final, interest on the amount remaining unpaid shall be charged to the person at a rate and calculated in the same manner as provided under section 4141.23 of the Revised Code. When a person ordered to repay benefits has repaid all overpaid benefits according to a plan approved by the director, the director may cancel the amount of interest that accrued during the period of the repayment plan. The director may take action in the courts of this state to collect benefits and interest as provided in sections 4141.23 and 4141.27 of the Revised Code, in regard to the collection of unpaid contribu-

misrepresentation has been made “with the object of obtaining benefits to which the applicant or recipient was not entitled.” R.C. 4141.35(A). In addition to other penalties or forfeitures provided by law, the Director of Job and Family Services is required to reject or cancel the person’s claim for benefits or benefit rights and to declare the person ineligible for certain benefits claimed within six years. R.C. 4141.35(A)(1) and (2). With regard to the recovery of fraudulent overpayments, the Director “[b]y order shall require that the total amount of benefits rejected or canceled . . . be repaid to the director” before the person may become eligible for further benefits, and “shall withhold” the unpaid sums from future benefit payments to the claimant. R.C. 4141.35(A)(3). If the benefits are not repaid within thirty days after the Director’s order becomes final, interest is charged, but the interest charge may be canceled if full payment is made under a repayment plan.

Division (A) of R.C. 4141.35 contains specific provisions relating to legal action, stating that the Director “may take action in the courts of this state to collect benefits and interest as provided in sections 4141.23 and 4141.27 of the Revised Code, in regard to the collection of unpaid contributions, using the final repayment order as the basis for such action.” R.C. 4141.35(A)(3). Division (A) prohibits the initiation of administrative or legal proceedings for the collection of benefits or interest after six years from the date on which the Director’s order requiring repayment became final, requiring that amounts not recovered at that time be canceled as uncollectible. *Id.* Division (A) also expressly authorizes the Director to take action to collect fraudulently-obtained benefits, interest, and court costs through attachment proceedings under R.C. Chapter 2715 and garnishment proceedings under R.C. Chapter 2716. R.C. 4141.35(A)(5). *See generally Barilla v. Director, ODJFS*, No. 02CA008012, 2002-Ohio-5425, at ¶ 35-36 (Ct. App. Lorain County Oct. 9, 2002) (action under R.C. 4141.35(A) for fraudulent misrepresentation to obtain benefits is a special statutory action arising under a specific unemployment statute).

R.C. 4141.23 and R.C. 4141.27, referenced in division (A), apply to tions, using the final repayment order as the basis for such action. No administrative or legal proceedings for the collection of such benefits or interest due shall be initiated after the expiration of six years from the date on which the director’s order requiring repayment became final and the amount of any benefits or interest not recovered at that time, and any liens thereon, shall be canceled as uncollectible.

(4) May take action to collect benefits fraudulently obtained under the unemployment compensation law of any other state or the United States or Canada. Such action may be initiated in the courts of this state in the same manner as provided for unpaid contributions in section 4141.41 of the Revised Code.

(5) May take action to collect benefits that have been fraudulently obtained from the director, interest pursuant to division (A)(3) of this section, and court costs, through attachment proceedings under Chapter 2715. of the Revised Code and garnishment proceedings under Chapter 2716. of the Revised Code. (Emphasis added.)

employer contributions and set forth procedures for collecting amounts unpaid. R.C. 4141.23 contains interest provisions and provides for amounts not paid when due to become a lien upon the real and personal property of the employer. R.C. 4141.27 establishes specific collection procedures that apply after the Director of Job and Family Services notifies a noncomplying employer of the amount due, including interest, and orders it to be paid. Relevant provisions of R.C. 4141.27 state:

If said amount is not paid within ten days after receiving notice, the director shall certify that finding relative to such employer to the attorney general, who shall forthwith institute a civil action against such employer in the name of the state for the collection of such contribution and interest. In such action it is sufficient for the plaintiff to set forth a copy of such finding as certified by the director to the attorney general and to state that there is due to plaintiff on account of such finding a specified sum which plaintiff claims with interest. A certified copy of such finding of the amount of contribution due shall be attached to the petition and is prima-facie evidence of the truth of the facts therein contained. The answer or demurrer to such petition shall be filed within ten days, the reply or demurrer to the answer within twenty days, and the demurrer to the reply within thirty days after the return day of the summons or service by publication. All motions and demurrers shall be submitted to the court within ten days after they are filed. As soon as the issues are made up in any such case, it shall be placed at the head of the trial docket and shall be first in order of trial. (Emphasis added).

The provisions of R.C. 4141.23 and R.C. 4141.27 thus establish procedures for collecting contributions and interest from noncomplying employers. The procedures mandate a civil action brought by the Attorney General, establish a certified copy of the Director's finding of the amount due (as certified to the Attorney General) as prima facie evidence of the truth of the facts it contains, and provide for an expedited schedule. These procedures assist the collection of amounts due from noncomplying employers and, through the reference in division (A), also assist the collection of fraudulent overpayments of unemployment compensation benefits.

It has been suggested that the absence in division (B) of language similar to that in division (A) authorizing legal action and participation by the Attorney General indicates that there is no authority for any legal action or involvement of the Attorney General with regard to the collection of non-fraudulent overpayments under division (B). We cannot accept this argument. Rather, we find that the language of division (A) reflects the importance attached to the collection of fraudulent overpayments, giving that process the same procedural benefits granted to the collection of contributions from noncomplying employers. The adoption of these procedures for quick and efficient enforcement may be based upon the culpability involved in a fraudulent or noncomplying act, in contrast with the non-fraudulent situation encompassed in division (B), or it may reflect a legislative determination

that prompt and efficient enforcement under division (A) and R.C. 4141.27 is essential to the effective operation of the unemployment compensation program. The fact that the same procedural benefits are not given to claims for non-fraudulent overpayments under division (B) indicates that these claims do not have priority as great as that given to claims for fraudulent overpayments under division (A), but it does not address the application of R.C. 131.02.

As discussed above, division (B) of R.C. 4141.35 clearly authorizes the Director of Job and Family Services to issue orders requiring applicants to repay non-fraudulent benefit overpayments, and R.C. 131.02 includes these orders as amounts payable to the state that, in appropriate circumstances, must be certified to the Attorney General. By its terms, R.C. 131.02 applies, “[w]henver any amount is payable to the state,” if the amount is not paid within the specified time period. R.C. 131.02(A). The Attorney General is given statutory authority to prescribe the form and manner in which the amount due is certified, and the manner and amount in which the collection cost is assessed to the amount certified. *Id.*

R.C. 131.02 also establishes procedures for the Attorney General to follow in making collections. Initially, the Attorney General “shall give immediate notice by mail or otherwise to the party indebted of the nature and amount of the indebtedness.” R.C. 131.02(B). Then the Attorney General “shall collect the claim or secure a judgment and issue an execution for its collection.” R.C. 131.02(C). The statute provides for the assessment of interest from the date on which the claim became due, at the rate required by R.C. 5703.47. R.C. 131.02(D). The statute also authorizes the Attorney General and the chief officer of the agency reporting a claim, acting together, to compromise the claim, to extend the time for payment of the claim by agreeing to accept periodic payments, and to add fees to recover the cost of processing checks returned for insufficient funds or the cost of providing electronic payment options, if they find that any of these actions is in the best interests of the state. R.C. 131.02(E). In addition, R.C. 131.02 describes actions that the Attorney General, with the consent of the chief officer of the agency reporting the claim, may take with regard to a claim that is found to be uncollectible – namely, selling or transferring the claim to one or more private entities for collection, and canceling the claim or causing it to be canceled. R.C. 131.02(F). The statute also requires that an unsatisfied claim be canceled forty years after the date on which it was certified. *Id.*; *see also* R.C. 131.03 (“in addition to the powers otherwise reposed in him,” the Attorney General has “such further powers to enforce payment as are given by law” to the officers, boards, or commissions that originally certified the charges).

R.C. 131.02 thus establishes a comprehensive array of powers and procedures for the collection of claims, so that it is not necessary for the statutes under which claims arise to establish powers and procedures governing their collection. If, like division (A) of R.C. 4141.35, a statute establishes specific procedures for the collection of particular claims, these procedures prevail over the general provisions of R.C. 131.02. *See* R.C. 1.51 (in the case of irreconcilable conflict, a special provision prevails as an exception to a general provision, “unless the general provision is the later adoption and the manifest intent is that the general provision prevail”);

Barilla v. Director, ODJFS, 2002-Ohio-5425, at ¶35-36; 1987 Op. Att’y Gen. No. 87-027, at 2-194 n.3. Where no specific procedures are established by a particular statute, the collection of amounts due proceeds in the ordinary course prescribed pursuant to R.C. 131.02.

The ordinary course of collections pursuant to R.C. 131.02 – including notice, litigation, collection of interest, and various options – is the procedure applicable to accounts certified to the Attorney General for collection pursuant to division (B) of R.C. 4141.35. The fact that the Director of Job and Family Services is authorized to initiate legal action to collect non-fraudulent overpayments is evident from the provisions of R.C. 4141.35(B)(3) that prohibit the Director from initiating further action to collect the overpayments following three years from the date the Director’s order requiring payment became final; the three-year limitation contrasts with the six-year limitation for the initiation of administrative or legal proceedings contained in division (A)(3). Further, in collecting claims under R.C. 131.02, the Attorney General is given the same powers to enforce payment that are given to the officer certifying the claims and may, thus, take whatever action the Director of Job and Family Services could take in this regard. R.C. 131.03.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised, that the Director of Job and Family Services is authorized: (1) to certify to the Attorney General, for collection pursuant to R.C. 131.02, any amounts of non-fraudulent unemployment compensation benefit overpayments required by order of the Director under R.C. 4141.35(B) to be repaid, if those amounts are not paid within forty-five days after payment is due; and (2) in this manner, to initiate legal action to recover non-fraudulent unemployment compensation benefit over-payments.