

April 22, 2014

The Honorable Anneka P. Collins  
Highland County Prosecuting Attorney  
112 Governor Foraker Place  
Hillsboro, Ohio 45133

**SYLLABUS:**

2014-017

County probation department community service workers may not enter upon and clean up private property for the City of Hillsboro pursuant to a municipal ordinance that authorizes City of Hillsboro “employees” or “contractors” to perform the clean-up work.



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April 22, 2014

OPINION NO. 2014-017

The Honorable Anneka P. Collins  
Highland County Prosecuting Attorney  
112 Governor Foraker Place  
Hillsboro, Ohio 45133

Dear Prosecutor Collins:

You have requested an opinion whether county probation department community service workers may be used for the purpose of cleaning up private property for a municipality located in the county when the property's conditions violate a municipal ordinance.<sup>1</sup> If so, you also ask whether the county will be liable should the property owner pursue a successful action against the city for entering the property.

Your request explains that the City of Hillsboro “has a municipal ordinance that allows ‘city employees or (employed) contractors’ to enter private property for cleaning purposes, including mowing grass and trash removal.” Your office furnished us additional information about the two ordinances that are of concern. One of these ordinances provides that “the city will enter with its employees or contractors” to mow a lawn, including on private property, in certain circumstances. City of Hillsboro Municipal Ordinance, § 93.101. The other ordinance states that the city “shall employ such contractors as are necessary” to tend to weeds, including on private property, in certain circumstances. City of Hillsboro Municipal Ordinance, § 93.12. The City of Hillsboro has requested the use of county probation department community service workers to perform clean-up work on private property pursuant to these municipal ordinances. Your request states that community service work has been ordered for criminal offenders by a judge of the Hillsboro Municipal Court. It is our understanding, however, that the court has not specifically ordered an offender to clean up private property in the City of Hillsboro in order to fulfill a community service sentence.

We first review Ohio's statutory scheme governing the sanction of community service. Each county in Ohio is served by a court of common pleas. Ohio Const. art. IV, §§ 1 and 4; R.C. 2301.01;

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<sup>1</sup> The term “county probation department community service workers” refers to criminal offenders who are sentenced by a court of common pleas or a municipal court to perform community service work and whose community service work is administered and supervised by a county department of probation. *See* R.C. 2301.28; R.C. 2929.15; R.C. 2929.17(C); R.C. 2929.25; R.C. 2929.27; R.C. 2951.02(B).

*see also* 2012 Op. Att’y Gen. No. 2012-042, at 2-367. The General Assembly also has established municipal courts throughout Ohio. R.C. 1901.01; R.C. 1901.02; *see also* 2012 Op. Att’y Gen. No. 2012-042, at 2-367. In Highland County, the Hillsboro Municipal Court has jurisdiction “within all of Highland county except within Madison township.”<sup>2</sup> R.C. 1901.02(B).

In some cases, a court of common pleas or a municipal court may sentence an offender who pleads guilty to or is convicted of a felony or misdemeanor to a community control sanction. A community control sanction may require the offender to perform supervised community service work.<sup>3</sup> R.C. 2951.02(B); R.C. 2929.15; R.C. 2929.17(C); R.C. 2929.25; R.C. 2929.27. For a felony offense, a court may impose a sentence of supervised community service work on an offender who is not required to serve a mandatory prison term. R.C. 2929.15(A); R.C. 2929.17(C). Similarly, a court may sentence an offender to supervised community service work when imposing a sentence for a misdemeanor, “other than a minor misdemeanor,” when the law does not require a mandatory jail term. R.C. 2929.25(A); R.C. 2929.27(A)(3). With respect to minor misdemeanors, a sentencing court may impose a term of community service work in lieu of all or part of a fine. R.C. 2929.27(D). R.C. 2951.02(B) further states that a court may impose a term of supervised community service work as follows:

If an offender is convicted of or pleads guilty to a misdemeanor, the court may require the offender, as a condition of the offender’s sentence of a community control sanction, to perform supervised community service work in accordance with this division. If an offender is convicted of or pleads guilty to a felony, the court, pursuant to [R.C. 2929.15 and R.C. 2929.17], may impose a sanction that requires the offender

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<sup>2</sup> R.C. 2931.03 and R.C. 1901.20 set forth the jurisdiction of a court of common pleas and municipal court, respectively, in criminal cases. A court of common pleas “has original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas.” R.C. 2931.03; *see also* 2004 Op. Att’y Gen. No. 2004-010, at 2-82 n.4. A court of common pleas and a municipal court have concurrent jurisdiction in some criminal matters. *See* R.C. 2931.03; R.C. 1901.20; 2012 Op. Att’y Gen. No. 2012-042, at 2-367 (explaining jurisdiction of court of common pleas and municipal court); 2004 Op. Att’y Gen. No. 2004-010, at 2-82 n.4; 1987 Op. Att’y Gen. No. 87-097, at 2-646; 1986 Op. Att’y Gen. No. 86-065, at 2-350.

<sup>3</sup> A “community control sanction” is defined, for purposes of R.C. Chapters 2929 (penalties and sentencing) and 2951 (probation), as “a sanction that is not a prison term and that is described in [R.C. 2929.15, R.C. 2929.16, R.C. 2929.17, or R.C. 2929.18] or a sanction that is not a jail term and that is described in [R.C. 2929.26, R.C. 2929.27, or R.C. 2929.28].” R.C. 2929.01(E); *see also* R.C. 2951.01. Other types of community control sanctions include a residential sanction such as a term in a community-based correctional facility or halfway house. R.C. 2929.16; R.C. 2929.26. Community control sanctions also may include nonresidential sanctions such as house arrest with electronic monitoring, a drug treatment program, probation, or drug and alcohol use monitoring. R.C. 2929.17; R.C. 2929.27.

to perform supervised community service work in accordance with this division. The supervised community service work shall be under the authority of health districts, park districts, counties, municipal corporations, townships, other political subdivisions of the state, or agencies of the state or any of its political subdivisions, or under the authority of charitable organizations that render services to the community or its citizens, in accordance with this division. The court may require an offender who is ordered to perform the work to pay to it a reasonable fee to cover the costs of the offender's participation in the work, including, but not limited to, the costs of procuring a policy or policies of liability insurance to cover the period during which the offender will perform the work.

R.C. 2951.02 also states that “[a]n agency, political subdivision, or charitable organization must agree to accept the offender for the work before the court requires the offender to perform the work for the entity.” R.C. 2951.02(B)(2). The community service work must be supervised by an official of, or a person designated by, the agency, political subdivision, or charitable organization for which the work is performed. R.C. 2951.02(B)(4). This person must be qualified for the supervision “by education, training, or experience” and periodically must report the offender’s conduct in performing the work to the court and the offender’s probation officer. *Id.*

Community control sanctions, including supervised community service work, may be administered and supervised by a county department of probation. *See* R.C. 2301.28; *see also* R.C. 2301.30; R.C. 2929.15(A)(2)(a); R.C. 2929.25(C)(1); *State v. Eisele*, No. 2013CA00037, 2014-Ohio-662, 2014 WL 726730, at ¶18 (Stark County Feb. 18, 2014) (“those who are placed on community control are monitored by the county probation department”); 2006 Op. Att’y Gen. No. 2006-024, at 2-211. A county department of probation may be established by a court of common pleas.<sup>4</sup> R.C. 2301.27(A)(1)(a). A court of common pleas that has established a county department of probation appoints the department’s probation officers and supervises the department. *See* R.C. 2301.27; *see also* R.C. 2301.29 (authorizing the court of common pleas to “exercise supervision over the department by adopting rules that are not inconsistent with law or with the rules of the adult parole authority and that shall be observed and enforced by the probation officers of the department”); R.C.

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<sup>4</sup> The General Assembly has provided alternatives to the establishment of a county department of probation by a court of common pleas. R.C. 2301.27(A)(2) permits the judges of the courts of common pleas of two or more counties to establish a joint department of probation. R.C. 2301.32(B) permits a court of common pleas to enter into an agreement with the Adult Parole Authority rather than create a county department of probation. R.C. 2301.27(B) permits a court of common pleas or the courts of common pleas of two or more adjoining counties to request the board of county commissioners to contract with certain entities for the provision of probation and supervisory services for persons placed under community control sanctions. *See also* 2002 Op. Att’y Gen. No. 2002-004, at 2-16 to 2-17 (discussing alternatives to the establishment of a county department of probation). The county department of probation in Highland County was created by the court of common pleas pursuant to R.C. 2301.27(A)(1)(a).

2301.30 (court of common pleas must adopt rules regarding the supervision of the department); 2002 Op. Att’y Gen. No. 2002-004, at 2-16.

County probation officers “shall perform any duties that are designated by the judge or judges of the court [of common pleas].” R.C. 2301.27(A)(1)(c). A county department of probation and its probation officers also are “responsible for supervising on behalf of the court of common pleas persons who are under the supervision and control of the court.” 2006 Op. Att’y Gen. No. 2006-024, at 2-211; *see also* R.C. 2301.28; R.C. 2301.30; R.C. 2929.15(A)(2)(a); R.C. 2929.25(C). R.C. 2301.30 sets forth specific duties of the county department of probation as follows:

(A) Furnish to each person under a community control sanction or post-release control sanction or on parole under its supervision or in its custody, a written statement of the conditions of the community control sanction, post-release control sanction, or parole and instruct the person regarding the conditions;

(B) Keep informed concerning the conduct and condition of each person in its custody or under its supervision by visiting, the requiring of reports, and otherwise;

(C) Use all suitable methods, not inconsistent with the conditions of the community control sanction, post-release control sanction, or parole, to aid and encourage the persons under its supervision or in its custody and to bring about improvement in their conduct and condition;

(D) Establish policies regarding the supervision of probationers that shall include, but not be limited to, all of the following:

(1) The minimum number of supervision contacts required for probationers, based on each probationer’s risk to reoffend as determined by the single validated risk assessment tool selected by the department of rehabilitation and correction under [R.C. 5120.114], under which higher risk probationers receive the greatest amount of supervision;

(2) A graduated response policy to govern which types of violations a probation officer may respond to administratively and which type require a violation hearing by the court.

(E) Keep detailed records of the work of the department, keep accurate and complete accounts of all moneys collected from persons under its supervision or in its custody, and keep or give receipts for those moneys;

(F) Make reports to the adult parole authority created by [R.C. 5149.02] that it requires.

A county department of probation may administer and supervise a sanction of supervised community service for offenders sentenced not only by the court of common pleas within the county, but also offenders sentenced by other courts in the state:

The court of common pleas of a county in which a county department of probation has been established ... shall receive into the legal control or supervision of the department any person who is a resident of the county and who has been placed

under a community control sanction by order of any other court exercising criminal jurisdiction in this state, whether within or without the county in which the department of probation is located, upon the request of the other court and subject to its continuing jurisdiction.

R.C. 2301.28. R.C. 2929.15 provides that a sentencing court imposing a community control sanction for a felony pursuant to R.C. 2929.16-.18

shall place the offender under the general control and supervision of a department of probation in the county that serves the court.... Alternatively, if the offender resides in another county and a county department of probation has been established in that county or that county is served by a multicounty probation department ... the court may request the court of common pleas of that county to receive the offender into the general control and supervision of that county or multicounty department of probation....

R.C. 2929.15(A)(2)(a). Similarly, R.C. 2929.25(C) provides that a sentencing court imposing a community control sanction for a misdemeanor pursuant to R.C. 2929.26-.28

shall place the offender under the general control and supervision of the court or of a department of probation in the jurisdiction that serves the court for purposes of reporting to the court a violation of any of the conditions of the sanctions imposed. If the offender resides in another jurisdiction and a department of probation has been established to serve the municipal court or county court in that jurisdiction, the sentencing court may request the municipal court or the county court to receive the offender into the general control and supervision of that department of probation for purposes of reporting to the sentencing court a violation of any of the conditions of the sanctions imposed. The sentencing court retains jurisdiction over any offender whom it sentences for the duration of the sanction or sanctions imposed.

Your request states that a municipal court judge has ordered community service work for certain offenders. Pursuant to R.C. 2301.28, R.C. 2929.15, and R.C. 2929.25, the Highland County Department of Probation may receive into its control and supervision offenders sentenced to supervised community service work by a municipal court judge.

You ask whether county probation department community service workers may be used for the purpose of cleaning up private property for a municipality located in the county when the property's conditions violate a municipal ordinance. We first consider whether a county department of probation may assign county probation department community service workers to perform work for a city. R.C. 2951.02(B) states that the supervised community service work "shall be under the authority of health districts, park districts, counties, *municipal corporations*, townships, other political subdivisions of the state, or agencies of the state or any of its political subdivisions, or under the authority of charitable organizations that render services to the community or its citizens, in accordance with this division." (Emphasis added.) The statute also requires that a political subdivision "agree to accept the offender for the work before the court requires the offender to

perform the work for the entity.” R.C. 2951.02(B)(2). In this instance, the city has requested the use of the county probation department community service workers for this purpose. Therefore, community service workers who are under the control and supervision of the county department of probation may be assigned to perform work for a city where, as here, the city has requested use of those workers.

We next consider whether the county probation department community service workers may perform the type of work requested by the city. Here, the city would like the community service workers to clean up private property pursuant to municipal ordinances that permit the city to enter upon and clean up private property when the property’s conditions violate those ordinances. For purposes of determining whether county probation department community service workers may perform this work, it is significant that the city’s request involves entering upon private property. Generally, a person may not enter onto another’s private property without authority or privilege. *See, e.g., Apel v. Katz*, 83 Ohio St. 3d 11, 19, 697 N.E.2d 600 (1998) (“[a] common-law tort in trespass upon real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another whereby damages directly ensue”) (quoting *Linley v. DeMoss*, 83 Ohio App. 3d 594, 598, 615 N.E.2d 631 (Franklin County 1992)). Thus, county probation department community service workers may not enter private property for the purpose of cleaning up the property without authority or privilege.<sup>5</sup>

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<sup>5</sup> If county probation department community service workers enter private property without authority or privilege, the county may be subject to a legal action and potential liability based on the acts of those community service workers. *See generally Harris v. City of Akron*, No. 17945, 1997 WL 423037 (Ct. App. Summit County July 23, 1997) (civil action by private property owner against city alleging, in part, trespass; after receiving a report of a potential hazard, two city employees entered private property to inspect a potentially hazardous building and, ultimately, to demolish the building); *Monesky v. City of Wadsworth*, No. 2478-M, 1996 WL 148655, at \*2 (Ct. App. Medina County Apr. 3, 1996) (civil trespass action by private property owner against city where contractor employed by city entered property in order to enforce municipal ordinance regarding the abatement of an alleged nuisance); *Chalker v. Howland Twp. Bd. of Trs.*, 74 Ohio Misc. 2d 5, 658 N.E.2d 335 (C.P. Trumbull County 1995) (civil action by private property owner against township and township board of trustees asserting, in part, trespass; township fire chief and other township employees entered property to inspect safety of premises and, later, to remove buildings and cut weeds). A county’s immunity from tort liability likely will depend, at least in part, on whether the county probation department community service workers entered the private property under authority of a specific law. *See* R.C. 2744.02(A)(1) (political subdivision is not liable in damages for acts or omissions of the political subdivision or an employee in connection with a governmental function); R.C. 2744.01(C)(2)(i) (“governmental function” includes the enforcement of any law); *see also* R.C. 2744.01(B) (for purposes of R.C. Chapter 2744, “[e]mployee” 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”); R.C. 2744.01(D)

Because county probation department community service workers may not enter private property without authority or privilege, we must determine whether any law gives county probation department community service workers authority to enter upon private property for the purpose of cleaning up the property. R.C. 2951.02 does not specify the type of community service work an offender may perform. Likewise, no language in R.C. 2929.15, R.C. 2929.17, R.C. 2929.25, or R.C. 2929.27 specifies the type of community service that must be performed. Further, a sentencing court is not required to select, at the time the offender is sentenced, the type of community service work to be performed. *See* R.C. 2929.15; R.C. 2929.17; R.C. 2929.25; R.C. 2929.27; *State v. Johnson*, 164 Ohio App. 3d 792, 2005-Ohio-6826, 844 N.E.2d 372, at ¶60 (Greene County) (explaining that R.C. 2929.27 does not “require the court to specify what service a defendant must perform”). Rather a sentencing court “is afforded very broad discretion in that regard. The particulars are typically worked out in conjunction with the court’s probation officer after sentence is imposed.” *State v. Johnson*, 164 Ohio App. 3d 792, at ¶60.

In your particular circumstance, the City of Hillsboro has requested that county probation department community service workers enter private property and perform clean-up work pursuant to municipal ordinances. The pertinent ordinances of the City of Hillsboro authorize its “employees” or “contractors” to perform specified clean-up work, such as mowing grass, on private property. City of Hillsboro Municipal Ordinance, §§ 93.101 and 93.12. The ordinances thus explicitly limit who may perform the clean-up work to “employees” or “contractors” of the City of Hillsboro; county probation department community service workers may enter private property and clean up private property pursuant to these ordinances only if they are “employees” or “contractors” of the City of Hillsboro, as understood by these municipal ordinances.

The terms “employees” and “contractors” are not defined by sections 93.101 or 93.12 of the municipal ordinances. Nor are these terms defined elsewhere in the city ordinances for purposes of the pertinent provisions. When a word is left undefined, it is typically accorded its common, everyday meaning. *See State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449 (1983); 2006 Op. Att’y Gen. No. 2006-042, at 2-412 (where “employee” is not defined in Revised Code, it is afforded its common, everyday meaning); 1996 Op. Att’y Gen. No. 96-007, at 2-27 (same as previous parenthetical). In common usage, “employee” refers to a person who works under the supervision and control of another person for wages or salary. *Merriam-Webster’s Collegiate Dictionary* 408 (11th ed. 2005); *Black’s Law Dictionary* 525 (6th ed. 1990); *see also* 2006 Op. Att’y Gen. No. 2006-042, at 2-412; 1996 Op. Att’y Gen. No. 96-007, at 2-27. An employment relationship typically arises by express or implied contract and includes payment of wages or salary to the employee. 1996 Op. Att’y Gen. No. 96-007, at 2-28; 1974 Op. Att’y Gen. No. 74-064, at 2-265. County probation department community service workers do not receive salaries or wages from the city nor is there an express or implied contract between the city and the workers. *See Republic-Franklin Ins. Co. v. City of Amherst*, 50 Ohio St. 3d 212, 553 N.E.2d 614 (1990) (concluding that a person who consents to perform community

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(“[l]aw” includes charters, ordinances, resolutions, and rules of political subdivisions); R.C. 2744.01(F) (“[p]olitical subdivision” includes a municipal corporation and a county).

service work in lieu of a jail sentence is not an “employee” of a city for which he performs community service for purposes of workers’ compensation laws, the court finding that “no contract of hire” existed between the community service worker and the city for which the work was performed); 1982 Op. Att’y Gen. No. 82-041, at 2-117 (considering whether a political subdivision must make contributions to a workers’ compensation fund on behalf of a person on probation to perform community service work, the opinion noted that these individuals do not receive wages, are not under a contract for hire, and do not have an “employer/employee relationship” with the political subdivision for which they perform community service work). Therefore, county probation department community service workers ordered to perform community service work for the City of Hillsboro are not “employees” of the City of Hillsboro.

“Contractor” is commonly defined as “[o]ne who contracts to do work for another.... One who in the pursuit of independent business undertakes to perform a job or piece of work, retaining in himself control of means, method and manner of accomplishing the desired result.” *Black’s Law Dictionary* 326 (6th ed. 1990). *Accord Merriam-Webster’s Collegiate Dictionary* 270 (11th ed. 2005); *see also* 2007 Op. Att’y Gen. No. 2007-046, at 2-454 to 2-455 (“independent contractor,” in contrast to an “employee,” has responsibility for determining the manner or means of performing the work or job). County probation department community service workers do not enter into contracts with a city when they perform community service work for the city. Further, county probation department community service workers do not operate an “independent business” nor do they retain control over the means, manner, or method of performing the community service work. Accordingly, county probation department community service workers ordered to perform community service work for the City of Hillsboro are not “contractors” of the City of Hillsboro.

Because county probation department community service workers ordered to perform community service work for the City of Hillsboro are not “employees” or “contractors” of the City of Hillsboro, county probation department community service workers may not enter upon and clean up private property for the City of Hillsboro pursuant to a municipal ordinance that authorizes City of Hillsboro “employees” or “contractors” to perform the clean-up work.

Your second question asks whether the county will be liable should a property owner pursue a successful action against the city for entering the property. Because we have concluded that county probation department community service workers may not enter upon and perform clean-up work on private property under the circumstances you have described, we need not address the county’s potential liability. *See generally* note 5, *supra*.

For the reasons discussed above, it is my opinion, and you are advised, county probation department community service workers may not enter upon and clean up private property for the City of Hillsboro pursuant to a municipal ordinance that authorizes City of Hillsboro “employees” or “contractors” to perform the clean-up work.

Very respectfully yours,

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

MICHAEL DEWINE  
Ohio Attorney General