December 13, 2007

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

SYLLABUS: 2007-041

A single-county board of mental retardation and developmental disabilities is a "county agency" for purposes of R.C. 124.391(C).

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OPINION NO. 2007-041

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You have requested the opinion of the Attorney General concerning the operation of R.C. 124.391(C) and its application to employees of a county board of mental retardation and developmental disabilities (county MR/DD board). You specifically ask whether the employees of a county board of mental retardation and developmental disabilities are eligible to participate in a sick leave bank donation program established by a board of county commissioners for county employees in accordance with R.C. 124.391(C).[1]

Operation of R.C. 124.391(C)

Let us begin by examining the language of R.C. 124.391(C), which states: "At the discretion of the appropriate legislative authority, a *county may* implement a leave donation

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[1] As explained by a member of your staff, you ask that we assume that there is no applicable collective bargaining agreement governing the subject of a sick leave bank donation program for county MR/DD employees. *See generally* 2006 Op. Att'y Gen. No. 2006-026 (in part, discussing the manner in which the compensation, including fringe benefits, of certain county MR/DD employees may be affected by a collective bargaining agreement entered into under R.C. Chapter 4117). In addition, we understand that Erie County's MR/DD board is a single-county board. *See generally* R.C. 5126.02(A) (requiring each county to have its own MR/DD board or to be a member of a multi-county MR/DD board). This opinion will, therefore, discuss the application of R.C. 124.391(C) only to single-county MR/DD employees in instances in which there is no collective bargaining agreement governing the subject of a sick leave bank donation program covering any of the board's employees.

program, as provided in this section,[2] for all county agencies or for one or more designated agencies within the county." (Emphasis and footnote added.) Thus, a board of county commissioners possesses authority to establish a sick leave donation program for one or more designated county agencies or for all county agencies.

The General Assembly has not defined the term "county agencies," as used in R.C. 124.391(C). We must, therefore, look to the common meaning of that term. R.C. 1.42. As summarized in 1993 Op. Att'y Gen. No. 93-065 at 2-308:

> Although there is no comprehensive test for determining whether an entity is an agency, board, commission, or authority of the county, prior Attorney General opinions have reasoned that an entity is a county board if it is "essentially a subdivision of the county or a subordinate department of the county." 1961 Op. Att'y Gen. No. 2383, p. 366 at 369; *see also* 1992 Op. Att'y Gen. No. 92-060. In order to determine whether an entity is essentially a subdivision or subordinate department of the county, Attorney General opinions have examined the following factors: (1) whether the territory that comprises the entity is coextensive with the territorial limits of the county, Op. No. 92-060; 1989 Op. Att'y Gen. No. 89-102; 1983 Op. Att'y Gen. No. 83-064; (2) whether the county is responsible for the organization and supervision of the entity, Op. No. 92-060; 1989 Op. Att'y Gen. No. 89-001; 1984 Op. Att'y Gen. No. 84-099; and (3) whether the entity is funded by or through the county, Op. No. 92-060; 1979 Op. Att'y Gen. No. 79-039.

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[2] R.C. 124.391 addresses a sick leave donation program for employees paid directly by warrant of the Auditor of State, as follows:

> (A) As used in this section, "paid leave" means sick leave, personal leave, or vacation leave.
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> (B) The director of administrative services may establish a program under which an employee paid directly by warrant of the director of budget and management may donate that employee's accrued but unused paid leave to another employee paid directly by warrant of the director of budget and management who has no accrued but unused paid leave and who has a critical need for it because of circumstances such as a serious illness or the serious illness of a member of the employee's immediate family.
>
> If the director of administrative services establishes a leave donation program under this division, the director shall adopt rules in accordance with Chapter 119. of the Revised Code to provide for the administration of the program. These rules shall include, but not be limited to, provisions that identify the circumstances under which leave may be donated and that specify the amount, types, and value of leave that may be donated.

See 1993 Op. Att'y Gen. No. 93-050 (using the same three factors to determine whether an entity is a "county board" for purposes of representation by the county prosecuting attorney under R.C. 309.09, and stating at 2-244, "[i]f an examination of these factors reveals, on balance, that the entity is a subdivision or subordinate department of the county, then it is likely that the entity is a county board"). We must, therefore, examine the territory within the jurisdiction of a single-county MR/DD board, the county's role in the organization and supervision of such a board, and the source of funding of such a board, to determine whether, on balance, a single-county MR/DD board is a county agency for purposes of R.C. 124.391(C).

Territory Served by Single-County MR/DD Boards

In accordance with R.C. 5126.02(A), each county must have its own MR/DD board or be a member of a multi-county MR/DD board. As required, in part, by R.C. 5126.04(A):

> (A) Each county board of mental retardation and developmental disabilities shall plan and set priorities based on available resources for the provision of facilities, programs, and other services to meet the needs of *county residents* who are individuals with mental retardation and other developmental disabilities, former residents of the county residing in state institutions or placed under purchase of service agreements under section 5123.18 of the Revised Code, and children subject to a determination made pursuant to section 121.38 of the Revised Code.
>
> Each county board shall assess the facility and service needs of the individuals with mental retardation and other developmental disabilities who are *residents of the county* or former residents of the county residing in state institutions or placed under purchase of service agreements under section 5123.18 of the Revised Code. (Emphasis added.)

Because Erie County has a single-county MR/DD board, the references in R.C. 5126.04 to county residents and former county residents refer to residents and former residents of Erie County.[3] The territory served by the Erie County MR/DD board is thus co-extensive with the territorial limits of Erie County.

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[3] R.C. 5126.027 states, in pertinent part:

> (B) Unless the context provides otherwise, a law enacted by the general assembly that refers to a county, or an entity or official of a county, that a county board of mental retardation and developmental disabilities serves shall be deemed to refer to the following:
>
> (1) In the case of a county with a single county board, that county or the county entity or official specified in the law;

County Organization and Supervision of County MR/DD Board

Prior to the enactment of Am. Sub. S.B. 10, 126th Gen. A. (2005) (eff. Sept. 5, 2005), each county had its own MR/DD board. Am. Sub. S.B. 10 gave counties the option of maintaining a single-county MR/DD board or participating in a multi-county board. R.C. 5126.021;[4] R.C. 5126.022.[5] In accordance with R.C. 5126.021 and R.C. 5126.022, the decision to participate in a multi-county MR/DD board is left to the discretion of the boards of county commissioners and the senior probate judge of each county that will be part of the multi-county board. Similarly, the decision whether a county will withdraw from a multi-county board is made by the board of county commissioners and the county's senior probate judge. R.C.

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(2) In the case of a county that is a member of a multicounty board, each of the counties that are members of the multicounty board or the specified entity or official of each of those counties.

[4] R.C. 5126.021, concerning the creation of a multi-county MR/DD board, states:

Subject to sections 5126.024 and 5126.025 of the Revised Code, a multicounty board of mental retardation and developmental disabilities may be created if each of the following, before January 1, 2007, and within a one-hundred-eighty-day period, adopt an identical resolution or issue an identical order providing for the creation of the multicounty board:

(A) A majority of the members of each of the boards of county commissioners seeking to create the multicounty board;

(B) The senior probate judge of each county served by those boards of county commissioners.

[5] R.C. 5126.022, concerning a county's joining an existing multi-county MR/DD board, states:

Subject to sections 5126.024 and 5126.025 of the Revised Code, a county that is not part of the creation of a multicounty board of mental retardation and developmental disabilities under section 5126.021 of the Revised Code may join the multicounty board if each of the following, within a sixty-day period, adopt an identical resolution or issue an identical order providing for the county to join the multicounty board:

(A) A majority of the members of the board of county commissioners of the county seeking to join the multicounty board;

(B) A majority of the members of each of the boards of county commissioners that are members of the multicounty board;

(C) The senior probate judge of the county seeking to join the multicounty board;

(D) The senior probate judge of each of the counties that are members of the multicounty board.

5126.023.[6] Thus, only with the consent of the senior probate judge and a majority of the board of county commissioners, all of whom are county officers, may a county MR/DD board be organized other than as a single-county board.

Although the Department of Mental Retardation and Developmental Disabilities possesses certain supervisory authority over county MR/DD boards, *see, e.g.*, R.C. 5126.056 (Department's termination of county board's medicaid local administrative authority); R.C. 5126.081 (Department's accreditation of county MR/DD boards), a single-county MR/DD board has always been considered part of county government. *See, e.g.*, R.C. 5126.02(A)(2) ("[t]he functions of a county board shall not be combined with the functions of any *other* entity of *county* government" (emphasis added)); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981) (finding the county MR/DD board to be a county board entitled to representation by the county prosecuting attorney under R.C. 309.09); *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (treating the county MR/DD board's employees as county employees for purposes of R.C. 124.38).

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[6] R.C. 5126.024 limits the authority of the county commissioners and senior probate judge to join or withdraw from a multi-county board, as follows:

> (A) If a board of county commissioners and senior probate judge propose to join in the creation of, join, or terminate the county's membership in a multicounty board of mental retardation and developmental disabilities as provided in section 5126.021, 5126.022, or 5126.023 of the Revised Code, the board of county commissioners and judge shall do both of the following:
>
> (1) Notify the county board of mental retardation and developmental disabilities in writing of their intent to join in the creation of, join, or terminate the county's membership in a multicounty board, including a written explanation of the administrative, fiscal, and performance considerations underlying the proposed action;
>
> (2) Provide the county board an opportunity to comment on the proposed action.
>
> (B) If the county board, not more than sixty days after receiving the notice under division (A) of this section, votes to oppose the proposed action and notifies the board of county commissioners and judge of the vote, the county may join in creation of a multicounty board, join a multicounty board, or terminate the county's membership in a multicounty board only on the unanimous vote of the board of county commissioners and the order of that judge to proceed with the creation of, joining, or termination of the county's membership in a multicounty board.

County Support of County MR/DD Board

As provided by R.C. 5126.05(G), "[t]he board of county commissioners *shall* levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties, and may utilize any available local, state, and federal funds for such purpose." (Emphasis added.) Thus, R.C. 5126.05(G) imposes a mandatory duty upon each county's board of commissioners to provide funds sufficient for a county MR/DD board to carry out its functions and duties. *See Cuyahoga County Bd. of Mental Retardation v. Cuyahoga County Bd. of Comm'rs*, 41 Ohio St. 2d 103, 322 N.E.2d 885 (1975). *See generally Dep't of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992) ("when it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute is *mandatory*," unless there appears a clear and unequivocal legislative intent that it receive a construction other than its ordinary usage). In addition, R.C. 5705.05(E) requires that a county's general levy for current expenses include amounts necessary for, among other things, "the support of mental health, mental retardation, or developmental disabilities services." A board of county commissioners possesses additional authority to provide funding for a county MR/DD board in accordance with R.C. 5705.222(A), which authorizes boards of county commissioners to propose special levies "for the operation of programs and services by county boards of mental retardation and developmental disabilities and for the acquisition, construction, renovation, financing, maintenance, and operation of mental retardation and developmental disabilities facilities."

Single-County MR/DD Board as A County Agency for Purposes of R.C. 124.391(C)

Examination of the three characteristics of a single-county MR/DD board, as discussed above, reveals that, on balance, a single-county MR/DD board is a county agency for purposes of R.C. 124.391(C). The territory served by a single-county MR/DD board is coextensive with the territory of the county. Whether a county has its own MR/DD board or wishes to participate in a multi-county board is a determination made by county officers, *i.e.*, the county commissioners and the county's senior probate judge. In addition, a single-county MR/DD board is part of county government. Finally, each county is responsible for providing funds to its county MR/DD board in an amount sufficient for the board to carry out its functions and duties.

We acknowledge that county MR/DD boards possess certain powers and characteristics that distinguish them from other county entities. For example, R.C. 5705.091 requires each county's board of commissioners to establish a county MR/DD general fund, and, "[u]nless otherwise provided by law, an unexpended balance at the end of a fiscal year in any account in the county mental retardation and developmental disabilities general fund shall be appropriated the next fiscal year to the same fund."

Another unusual feature of county MR/DD boards is found in R.C. 5126.02, which states that:

> (A) Each county shall either have its own county board of mental retardation and developmental disabilities or, pursuant to section 5126.021 or

> 5126.022 of the Revised Code, be a member of a multicounty board of mental retardation and developmental disabilities. Subject to division (B) of this section:
>
> (1) A county board shall be operated as a *separate administrative and service entity*.
>
> (2) The *functions* of a county board *shall not be combined* with the functions of any other entity of county government.
>
> (B) Division (A) of this section *does not prohibit or restrict any county board from sharing administrative functions or personnel* with one or more other county boards, including entering into an arrangement authorized by division (B) of section 5126.0226 of the Revised Code. (Emphasis added.)

The meaning of R.C. 5126.02(A)(1) and (2) and (B) is unclear.[7] For example, although R.C. 5126.02(A)(1) requires that a county MR/DD board operate as a separate administrative entity, R.C. 5126.02(B) states that R.C. 5126.02(A) does *not* prohibit a county MR/DD board from "sharing administrative functions" with other county boards.

Despite certain characteristics that distinguish county MR/DD boards from other entities of county government, when the characteristics of a single-county MR/DD are viewed in their totality, it is clear that a single-county MR/DD board is a "county agency" for purposes of R.C. 124.391(C). Specifically with respect to a single-county MR/DD board's treatment as a "county agency" for purposes of R.C. 124.391(C), we do not find the language of R.C. 5126.02(A)(1) to be problematic. The inclusion of a particular county agency in a program established under R.C. 124.391(C) simply authorizes, but does not require, an employee of such agency to "donate that employee's accrued but unused paid leave to another employee" of a county agency that is included in the program. Thus, participation in such program by any employee of a participating county agency is discretionary with the employee. In addition, R.C. 124.391(C) authorizes a board of county commissioners to establish a sick leave donation program for "all county agencies or for one or more designated agencies within the county." Accordingly, if a particular county agency would prefer not to participate in the county's sick leave donation program, it may request to be excluded. The General Assembly, however, has left to the discretion of the county commissioners the final decision whether a county agency will or will not be included in the program.

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[7] 2003 Op. Att'y Gen. No. 2003-009 interpreted this language at 2-62, as follows: "The language of [former] R.C. 5126.02(D) [currently at R.C. 5126.02(A)] stating that the board's 'functions shall not be combined with the functions of any other entity of county government' requires that the board remain separate and independent in its operations. The board must function as a separate entity, and not as part of any other entity of county government." The opinion then found that this language does not prohibit a county MR/DD board from combining its transportation activities with those of a separate subdivision. 2003 Op. Att'y Gen. No. 2003-009 did not, however, specifically address the scope of the mandate in R.C. 5126.02(A)(1) that a county MR/DD board be operated "as a separate administrative and service entity."

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that a single-county board of mental retardation and developmental disabilities is a "county agency" for purposes of R.C. 124.391(C).

Respectfully,

MARC DANN
Attorney General