



Members Only

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The Controlling Board*

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Origin

The Controlling Board is the principal instrument by which the General Assembly exercises a measure of continuing control over the enacted budget. The Board was first created in a general appropriations act in 1915. That act differed from earlier appropriation acts in that it contained numerous detailed appropriation line items rather than “lump sum” items.¹ Governor Frank B. Willis later explained the change by saying: “The tax-payer was confused by mysterious items appropriating ‘receipts and balances’ and ‘lump sums’ to be expended at the discretion of some department head. This unbusiness-like, extravagant system of financial juggling has been abolished and I very respectfully urge that hereafter only specific appropriations be made, as the Constitution of Ohio clearly and unmistakably provides.”²

If appropriations were to be more detailed, however, a means of making adjustments in them when the General Assembly was not in session seemed to be needed. An unnamed board was created with the power to authorize the expenditure of appropriated money “otherwise than in accordance with the detailed classifications” of the appropriations act “but within the same category of purposes for which the appropriation” was made.³

The Board was reestablished, and named the Controlling Board, in the General Appropriations Act of 1917.⁴ The Board was reestablished in the biennial appropriations act every two years afterward until 1975. During this period the Board shared budget adjustment responsibilities with the Emergency Board, which had come into existence in 1892.⁵ The Emergency Board was permitted to authorize more money to be spent to take care of a deficiency or of an emergency requiring the expenditure of money not specifically provided for by law.⁶ In 1975 the Controlling Board was established as a permanent agency and assigned most of the fiscal duties of the Emergency Board.⁷ The Emergency Board was abolished in 1989.⁸ At that time its only remaining function was to approve or disapprove requests for state officers and employees to travel outside the state at state expense.

After an appropriation bill is enacted, the Controlling Board exercises a measure of oversight in its implementation.

The Controlling Board was first created in 1915.

The Controlling Board initially shared budget adjustment responsibilities with the Emergency Board, which had been created in 1892.

In 1975 the Controlling Board assumed many of the duties of the Emergency Board. The Emergency Board was abolished in 1989.

* This *Members Only* brief is an update of an earlier brief on this subject dated October 22, 1999 (Volume 123 Issue 2).



When first created, the Controlling Board consisted of the Governor, Attorney General, Auditor of State, and the chairs of the House and Senate Finance committees.

Currently, the Controlling Board consists of seven members, six of whom are members of the legislature.

The dominance of the Controlling Board by the legislature helps to ensure that legislative intent can be implemented.

A representative of the Governor serves as Controlling Board President and presides at meetings.

Membership

Originally the Controlling Board consisted of five members—the Governor “or any competent, disinterested person to be appointed by him for such purpose,” the Attorney General, the Auditor of State, and the chairmen of the House and Senate Finance committees.⁹ Currently the Controlling Board consists of seven members, all but one of them from the legislative branch: (1) the Director of Budget and Management or an employee of the Office of Budget and Management designated by the Director, (2) the chairs of the House and Senate Finance committees, (3) one member of the majority party and one member of the minority party of the House appointed by the Speaker, and (4) one member of the majority party and one member of the minority party of the Senate appointed by the President of the Senate.¹⁰

The Attorney General and the Auditor of State were removed from the Board in 1969,¹¹ presumably because they had “no great stake in either policy making or execution.” The addition of four legislators to the Board helped ensure that agency spending would reflect legislative intent, recognized the impact that the Board’s decisions had on future fiscal and program policy, and extended representation to the minority party in each house of the General Assembly.¹²

In the event of the absence, illness, disability, death, or resignation of a legislative member of the Board,

the vacancy may be filled by the presiding officer making the original appointment. When engaged in their duties as members of the Board, the legislative members are paid at the per diem rate of \$150 plus necessary traveling expenses.¹³

President and Secretary of the Board

In practice, the President of the Controlling Board is appointed from outside the Office of Budget and Management and made a deputy director of the Office. The President is directed to prepare the “proposed agenda” for a meeting of the Board and, at least seven days before the meeting, to distribute copies of the agenda and supporting documentation to the members of the Board and the Legislative Service Commission (LSC).¹⁴ Nevertheless, as the Supreme Court observed in *State, ex rel. Meshel, v. Keip*, the General Assembly indicated, in the statute setting forth the notice requirement, an “awareness through the use of the phrase ‘proposed agenda’ that in some circumstances notice is not practical. Clearly a proposed agenda can be altered. Thus the board is allowed, where an exigency exists, to make a decision without providing such notice.”¹⁵

“Practically speaking,” the *Controlling Board Manual* states, “as a representative of the executive branch, the President acts in the interest of the administration by



determining which requests are to be presented to the Board for consideration and by working with agencies to help ensure the approval of agency requests.”¹⁶ Yet it is possible for the legislative members of the Board to consider an item in opposition to the President. If the Senate, House, Supreme Court, Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State, or Attorney General submits a request to the President that an item be added to the agenda, a majority of the members of the Board has the power, if the item is not currently before the Board, to require that it be added for a specified future meeting of the Board.¹⁷

Also, after items on the regular agenda have been disposed of, “the Controlling Board may agree to consider additional items.”¹⁸ Usually these “add-ons” are items that were requested too late to be placed on the announced agenda but which the President has determined are of an emergency nature or otherwise urgent to consider.

Finally, the Board is permitted, if it should choose to do so, to adopt rules authorizing the President “to act on its behalf in exigent circumstances affecting the public health, safety, or welfare.”¹⁹ In adopting these and any other rules, the Board is exempt from having to adhere to the rulemaking requirements that apply to most other agencies. Also, Board rules are not subject to review by the Joint Committee on Agency Rule Review.²⁰

The Secretary of the Board is designated by the Director of Budget and Management from among OBM’s employees. The Secretary is charged with assisting the President, making and keeping a record of each request received by the Board and its action on the request, and certifying a copy of the record of each action to each member of the Board and the Director.²¹ By Board rule, the Secretary is also charged with keeping the minutes of any regular or special meeting or executive session and with giving notice of special meetings to any person, including representatives of the news media, who requests it. In addition, the Secretary is charged with maintaining a list of persons who have requested in writing to be notified of meetings at which specified subjects that they designate are to be discussed.²²

Meetings

The Controlling Board is empowered to adopt procedural rules for the conduct of its business.²³ Under this authority, the Board has specified the information that must appear in a request that comes before it. There are five common types of request, each requiring different forms of documentation. The five request types are: capital, operating, operating transfer, fund/appropriation, and land acquisition.²⁴

Ordinarily a request must be submitted to the Secretary not later

The President of the Controlling Board sets the agenda.

The Controlling Board is delegated extraordinary rule-making authorization.



Normally, a request for an item to be placed on the agenda must be received at least 18 days prior to the meeting.

The Controlling Board can defer, approve, reject, or modify requests submitted to the Board. Normally, action by the Board requires only a simple majority vote.

than 9 a.m. on the 18th day prior to the date of the meeting for considering it. The first part of this period is for “technical, substantive, and policy review of the request by OBM.”²⁵ Exceptions to the 18-day requirement must be arranged with the President. The President has the option of placing an item on the agenda, sending it back to the requesting officer or agency for modification or further information, or deferring or withholding the item from the agenda.²⁶

The second part of the 18-day period is for review of the request by the legislative members of the Board, their aides, caucus staff, and LSC analysts.²⁷ Analysts’ comments, summaries, and background information, as well as analyst questions and agency answers, concerning some of the requests are compiled into a briefing document that LSC distributes to the leadership of the General Assembly, Controlling Board members and their aides, and caucus staff. As requested, LSC also briefs individual Controlling Board members and their aides prior to the Controlling Board meeting and provides staff to assist the Controlling Board in performing its duties and exercising its powers.²⁸ That staff regularly attends meetings of the Board.

The Board is obliged to meet at least once each month²⁹ but usually meets every other Monday at 1:30 p.m. in the North Hearing Room of the Senate Building. Typically a meeting lasts two to four hours and, in the course of a year, around 2,000 items are considered.³⁰ Because of

the advanced distribution of agency requests, action at a Board meeting can be quite expeditious.

Soon after the meeting begins, the President announces any items to be deferred, withdrawn, revised, or added to the current agenda. Each member is then given the opportunity to identify items on the agenda that the member would like to be held for discussion or testimony. All items not held are given blanket approval with the President recording any member abstentions to any specific items covered by the approval. One or more representatives of the agencies whose items were held will then answer questions. These items too are generally approved, although action on some items may be deferred until the next meeting.

That fact that only a small number of items are rejected or modified is not a good measure of the impact of the Board. Agencies generally want their requests to avoid controversy or the danger of rejection. The result is a measure of self-screening of requests by the agencies and further screening by the President of the Board.

When the Board was first created, the affirmative vote of no fewer than three of its five members was required for any action.³¹ Two years later the affirmative vote required for transferring amounts between appropriation items was raised to four,³² and in time that became the requirement for any action. Beginning in 1969, however, when the Board’s membership was expanded to seven, a simple majority has usually sufficed



for any action. Exceptions during the past few decades have included requirements of no fewer than five of the seven members or no fewer than four of the six legislative members.³³

Powers

The powers of the Controlling Board are found throughout the Revised Code and in the uncodified law of a variety of acts, especially appropriations acts. However, the organization and principal powers of the Board are set forth in Chapter 127. of the Revised Code.

When first created, the Board was authorized to (1) transfer amounts from one appropriation item to another, but only within the purpose for which the appropriation was made, and (2) adjust mathematical discrepancies in the appropriations act, with the advice and assistance of the agency affected—a power now exercised by the Director of Budget and Management.³⁴

Today the powers of the Controlling Board can be grouped into four main categories: (1) transferring money from one fund, appropriation item, or fiscal year to another, (2) releasing, or approving the expenditure of, appropriated funds, (3) approving miscellaneous requests, and (4) authorizing expenditures of excess or unanticipated revenue. As applicable, the Board is authorized to “approve, disapprove, modify as to specific dollar amounts, or defer requests.”³⁵

Transfers

Under Article II, Section 22 of the Ohio Constitution, money cannot be drawn from the state treasury except in pursuance of a specific appropriation made by law. However, money can be moved from one fund or appropriation to another, or from one fiscal year to another, without being drawn from the state treasury. The Director of Budget and Management has statutory authority to make transfers in a number of situations,³⁶ but the most comprehensive authority to make transfers rests with the Controlling Board. The *Controlling Board Manual* warns state agencies that the Board’s transfer authority “should not be viewed as an opportunity to begin new discretionary programs or expand initiatives beyond what was contemplated when the budget was developed. Requests for transfers of appropriation authority that build the base of a program and that may require higher levels of funding in the future are discouraged and will be subject to strict scrutiny.”³⁷

R.C. 127.14 permits the Board, at the request of any state agency or the Director of Budget and Management, to authorize, with respect to the provisions of an appropriations act:

(1) Transfers of all or part of an appropriation within but not between state agencies, except such transfers as the law authorizes the Director of Budget and Management to make. For example, upon the request of a state agency, the Controlling Board may authorize the transfer of the agency’s

The primary statutory provisions relating to the Controlling Board are in Chapter 127. of the Revised Code.

The most comprehensive authority to transfer funds from one account to another or between fiscal years is delegated to the Controlling Board.



Transfers of appropriated funds may not be made between state agencies or within an agency if the purpose is to implement a new program not authorized by the General Assembly.

remaining Maintenance appropriation to its Personal Services appropriation. The Board may also delegate to the Director of Budget and Management the power to approve transfers among items of appropriation within state agencies, but no such transfer may be made for the purpose of effecting new or changed levels of program service not authorized by the General Assembly. The Attorney General has stated that before the Board may consent to a transfer of funds from one item to another, it must be satisfied that the amount is not needed for the purposes for which it was appropriated.³⁸

(2) Transfers of all or part of an agency's appropriation from one fiscal year to another. Such transfers are frequently made near the end of the first fiscal year of a biennium in order that unused appropriations for that fiscal year will not lapse but will remain available to the agency during the second fiscal year of the biennium. In *State, ex rel. Meshel, v. Keip*, the Ohio Supreme Court examined the question of whether the exercise of this power of the Board constitutes an improper delegation of legislative authority. It does not, the Court held, as long as "there is some indication, implied or express, of a legislative intent to allow such action."³⁹ This principle is stated in R.C. 127.17 as follows: "The Controlling Board shall take no action which does not carry out the legislative intent of the general assembly regarding program goals and levels of support of state agencies as expressed in the pre-

vailing appropriation acts of the general assembly."

(3) Transfers of all or part of an appropriation within or between state agencies made necessary by administrative reorganization or by the abolition of an agency or part of it. For example, in the legislation that provided for the Ohio Athletic Commission to succeed the State Boxing Commission, the Director of Budget and Management was required to determine the amount of the unexpended balances in the appropriation accounts that pertained to the Boxing Commission and to recommend to the Controlling Board their transfer to the appropriation accounts that pertained to the Athletic Commission.⁴⁰ This power, the Ohio Supreme Court has determined, does not constitute a delegation of legislative power.⁴¹

(4) Transfers of all or part of cash balances in excess of needs to the General Revenue Fund from any other fund of the state, or to such other fund of the state to which the money would be credited if the fund with the excess did not exist. However, the Board may not authorize such transfers from the Accrued Leave Liability Fund, Auto Registration Distribution Fund, Budget Stabilization Fund, Gasoline Excise Tax Fund, General Revenue Fund, Highway Operating Fund, Horse Racing Tax Fund, Library and Local Government Support Fund, Liquor Control Fund, Local Government Fund, Local Transportation Improvement Program Fund, Ohio Fairs Fund, School District Income Tax Fund, State and Local Government



Highway Distribution Fund, State Highway Safety Fund, State Lottery Fund, Undivided Liquor Permit Fund, Volunteer Fire Fighters' Dependents Fund, Waterways Safety Fund, Wildlife Fund, Workers' Compensation Fund, any of the several bond funds or bond retirement funds enumerated in R.C. 127.14(D), and any other fund that the Director of Budget and Management determines to be a bond fund or bond retirement fund.

(5) Transfers of money included in the Emergency Purposes appropriation of the Controlling Board. Any such money that is not required to accomplish the purposes designated in the original request seeking the transfer must be returned to the Board. Temporary transfers may be made subject to conditions specified by the Board at the time the transfers are authorized.

(6) Temporary transfers of all or part of an appropriation or other money "into and between existing funds, or new funds, as may be established by law when needed for capital outlays for which notes or bonds will be issued."

In making any of these six kinds of transfers, R.C. 127.14 continues, the Controlling Board may not only make transfers to an existing appropriation item but also create and make transfers to a new appropriation item.

The Board is also permitted to authorize any state agency that receives a capital improvements appropriation to spend the money for purposes other than those set forth in an appropriations act through (1)

transfers among items or (2) the creation of new items and the authorization of transfers to them. However, prior to such action, the agency seeking the transfer must notify by mail the elected representatives to the General Assembly from the counties affected, stating the time and place of a hearing on the proposed transfers. The Board is expressly prohibited from authorizing an agency to use a capital appropriation for operating expenses unless the General Assembly provides for it.⁴²

Like most other state agencies, the Controlling Board receives appropriations from the General Assembly. Unlike most other agencies, however, the Board is not authorized to spend money; instead, it is merely authorized or directed to transfer the money to other agencies to spend. The best known of these appropriations is the one for "Emergency Purposes/Contingencies."

Another appropriation to the Board is one for "Employee Compensation Adjustment" (appearing usually when pay raises for state employees are provided for in the same act). Indeed, almost 73% of the General Revenue Fund appropriations made to the Board in the main operating appropriations act for the second fiscal year of the biennium ending June 30, 2001 were for that one item. The act authorizes the Board to (1) transfer amounts from the appropriation to the agencies affected based on requests submitted by the Director of Budget and Management to assist in paying the GRF share of

The Controlling Board may create and make transfers to a new appropriation item.



The Controlling Board is frequently authorized to transfer additional funds under its control to state agencies to pay for increases in the cost of state employee benefit packages negotiated by the state and employee collective bargaining units.

On occasion, appropriations to a state agency are made to the Controlling Board for release to the agency when certain conditions are met.

employee compensation increases and (2) “increase appropriations for any fund, as necessary for the various state agencies, to assist in paying the costs of increases in employee compensation”⁴³

On various occasions all or part of an appropriation for some other state agency has been made to the Controlling Board rather than to the agency itself. For example, in the 123rd General Assembly, an appropriation was made to the Controlling Board for each fiscal year of the biennium ending June 30, 2001 to be transferred to the Ohio Veterans’ Home to assist the Home “in defraying the operating expenses incurred as a result of its role in the planning and construction of a second veterans’ home.”⁴⁴

Also in the 123rd General Assembly, an appropriation was made to the Board for the second fiscal year of the biennium to be transferred to the Department of Job and Family Services upon the enactment by that General Assembly of legislation to establish a program of precertification and continuing training for foster caregivers.⁴⁵

Releases

Occasionally an amount is appropriated to a state agency along with *uncodified* language stating that the amount may not be spent until the Controlling Board “releases” it or “approves” its expenditure. For example, \$100,000 of the amount

appropriated to the Board of Regents for “Research Challenge” for the 1999 fiscal year was to be distributed by the Board of Regents on a project-by-project basis to the Ohio Plant Biotechnology Consortium for state university projects approved and recommended by the consortium, but not until released by the Controlling Board.⁴⁶

More frequently, *codified* laws make the spending of certain types of appropriations subject to Controlling Board approval. For example, the Department of Education is prohibited from distributing any money appropriated for the School Foundation Program (under which state subsidies are paid to school districts) without the approval of the Controlling Board. The State Board of Education is required to submit a yearly distribution plan to the Controlling Board at its first meeting in July, any proposed midyear revision in January, and any year-end revision in June. A board of education or governing board of an educational service center that does not conform to the requirements of law may not participate in the distribution except for good and sufficient reason established to the satisfaction of the State Board of Education and the Controlling Board.⁴⁷

The constitutionality of the power of the Controlling Board to release appropriations was upheld by the Ohio Supreme Court in a case that tested the constitutionality of the Ohio Turnpike Act:



In giving its approval and consent, the controlling board is exercising administrative and not legislative power. In effect, instead of having conferred the administrative power to determine whether to expend available moneys for the study of a turnpike project on the Director of Highways alone, the General Assembly has conferred that administrative power on the director and the controlling board acting together.⁴⁸

Waiving competitive selection

The principal statute that requires Controlling Board approval for non-competitively selected purchasing contracts is R.C. 127.16. It prohibits a state agency from using money that has been appropriated to it directly to make purchases from any particular supplier that, when combined with the amount of all disbursements to the supplier during the fiscal year for purchases made by the agency and the amount of all outstanding encumbrances for purchases made by the agency from the supplier, would amount to \$50,000 or more unless the purchase is (1) made by competitive selection, (2) approved by the Controlling Board, or (3) exempted by statute from Controlling Board approval.

The threshold for leases of real estate, which the law treats separately from purchases, is \$75,000. Purchases or leases made by competitive selection or with Board approval are excluded when computing whether these thresholds have been reached.

An explanation may clarify the prohibition. First, the term “state agency” refers to “every organized

body, office, or agency established by the laws of the state for the exercise of any function of state government.”⁴⁹

Second, an appropriation made “directly” to a state agency refers, for example, to an appropriation made to the Ohio Board of Regents or to The Ohio State University. An appropriation like the instructional subsidy that is made to the Board of Regents and, in turn, is distributed to OSU and other institutions of higher education by the Board of Regents is not viewed as a direct appropriation to those institutions.

Third, the word “purchase” as defined in the prohibition means not only to buy, but also to rent, lease, lease-purchase, or otherwise acquire supplies or services. The prohibition does not cover building construction and repairs but does cover professional design services.⁵⁰ “Disbursements” and “encumbrances” refer, respectively, to cash payments and to amounts reserved from an agency’s appropriation to make purchases or leases. Finally, “competitive selection” refers to the procedures that the Department of Administrative Services is required to follow in making purchases. Those procedures include competitive sealed bidding, competitive sealed proposals, or reverse auction.

This power of the Controlling Board to approve the making of a purchase without competitive selection may be exercised, upon the request of either a state agency or the Director of Budget and Management, as R.C. 127.16 states, “after the

The Controlling Board may waive the statutory requirements for competitive bidding on expenditures over a certain amount.



Any person who authorizes a purchase in violation of state laws requiring Controlling Board approval for noncompetitively selected purchases may be liable for any funds spent.

controlling board determines that an emergency or a sufficient economic reason exists.” This standard for Board action formed the basis of a 1963 decision by the Court of Appeals for Franklin County that the “action of the State Controlling Board approving a request to purchase, without competitive bidding . . . is invalid where there is no statement by such board that an emergency existed, nor any facts or reasons stated from which it could be implied that an emergency existed, and where on the evidence of record no emergency was shown.”⁵¹

Any person who authorizes a purchase in violation of R.C. 127.16 is liable to the state for any state funds spent on the purchase, and the Attorney General is required to collect the amount from the person. Such a recovery has been threatened on a couple occasions but, apparently, never carried out. This fact, as well as the willingness of the Board to grant retroactive approvals, has diminished the deterrent effect of the sanction.⁵²

In 1983 an effort was made to subject all state agencies, including agencies that obtain funds from bond proceeds, to R.C. 127.16.⁵³ The Governor vetoed the amendment, writing: “This language requires Controlling Board approval of all contracts let by bonding entities and others not previously subject to Controlling Board approval. This provision will add time and uncertainty to the bond sale process, increase the cost of issuance and limit the State’s ability to take advantage of the fluctuations in the bond market.”⁵⁴

Currently there are 39 categories of exemptions from the prohibition, including, by way of illustration: (1) various highway construction and repair contracts entered into by the Director of Transportation, (2) entertainment contracts for the Ohio State Fair, provided certain procedures are followed, (3) purchases made with money for the Per Cent for Arts Program, (4) any agency of the legislative or judicial branch of the state government, (5) purchases of fuel, or emergency repairs, for motor vehicles, aircraft, or watercraft when the purchases are made in accordance with rules of the Department of Administrative Services, (6) purchases of liquor for resale by the Division of Liquor Control, (7) purchases from other state agencies, including state-assisted institutions of higher education, and (8) purchases from a qualified nonprofit agency for the severely disabled.⁵⁵

Occasionally, the Controlling Board grants approval for an agency to make purchases from multiple vendors without either the vendors or the amount for each vendor being specified.

Releasing capital appropriations

Another important area in which the Controlling Board authorizes the release of appropriations is capital improvements. Board approval is required for the release of any money appropriated for (1) the purchase of real estate or (2) capital projects of a “general” nature. Within 60 days after the effective date of any act that makes



appropriations for capital projects, the Director of Budget and Management is required to determine and list which appropriations are for “general projects” and which are for “specific projects” and to submit to the Board a list of all the specific projects. As the Board is authorized to release money appropriated for general projects, the Director is authorized to release money appropriated for specific projects. However, the release of money for any specific higher education project that is to be funded from general purpose appropriations from the Higher Education Improvement Fund but is not on the list, and the release of money for any specific project that is on the list but will exceed estimated expenditures by more than 10%, are subject to Controlling Board approval.⁵⁶

Also, any request made to the Director of Budget and Management or the Board for the release of capital appropriations for contracts that are to be awarded by the Department of Administrative Services must contain a contingency reserve in an amount determined by the Department. Funds that remain in the reserve when the project is completed may, with Controlling Board approval, be released for other capital facilities projects of the agency or instrumentality.⁵⁷

Miscellaneous approvals

Not all laws requiring Controlling Board approval involve the transfer of money or the release or spending of appropriated funds. The following

selection of other laws illustrates the range of miscellaneous approval power that has been granted to the Board:

(1) A number of professional licensing boards are empowered to establish fees in excess of those set forth in statute, although not by more than 50%, if the Controlling Board approves.⁵⁸

(2) The board of trustees of the Ohio Veterans’ Home, subject to Controlling Board approval, is required to adopt rules for determining the ability of a resident of the Home to pay a portion of the expenses of the resident’s support.⁵⁹

(3) A state agency, with the approval of the Controlling Board, may establish a supplementary compensation schedule for licensed physicians employed by the agency in positions requiring a licensed physician.⁶⁰

(4) The Chancellor of the Ohio Board of Regents, with the periodic review and approval of the Controlling Board, may enter into reciprocal contracts with a contiguous state under which each state agrees to provide financial aid to the other state’s qualified students to attend its approved post-secondary educational institutions.⁶¹

(5) If the Chief of the Division of Wildlife determines that the various wildlife licenses, permits, and stamps issued by the Division or its authorized agents yield insufficient revenue to support proper wildlife management, the Chief, with the approval of the Controlling Board and the Wildlife

Release of appropriated funds by the Controlling Board is critical for certain capital improvement projects.



The Controlling Board is also delegated authorization to approve several types of additional requests. These include: the approval of professional licensing boards to charge fees in excess of statutorily specified amounts; the approval of the adoption of certain administrative rules; salary schedules of certain physicians; and similar miscellaneous approvals.

Council, may adopt rules to provide for the issuance and governance of management permits and to establish fees for such permits that do not exceed the fees established by law for hunting, fishing, or trapping.⁶²

(6) The Director of Environmental Protection is authorized to spend up to \$1.5 million from money credited to the Environmental Education Fund in any fiscal year, but must seek Controlling Board approval to spend in excess of that amount.⁶³

(7) The Ohio Board of Dietetics, subject to Controlling Board approval, may contract with a state agency or nonprofit corporation as necessary to carry out its powers and duties.⁶⁴

(8) The main operating appropriations act for the biennium ending June 30, 2009 limits undergraduate instructional and general fee increases for “institutions of state-supported higher education” except as necessary to comply with preexisting legal obligations or unfunded mandates; however, with the approval of the Controlling Board, the Ohio Board of Regents may modify these limitations in response to exceptional circumstances.⁶⁵

Authorizing expenditures of excess or unanticipated revenue

Article II, Section 22 of the Ohio Constitution states: “No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than

two years.” This is the foundation on which rests the General Assembly’s “power of the purse.”

An appropriation is an authorization made by law to incur liabilities for purposes specified in the appropriations act. But what constitutes a specific appropriation? The Supreme Court has declared: “It is apparent that the General Assembly may specify a purpose for which an appropriation is to be spent, and that an appropriation, although not in itself specific as to the amount but the purpose of which is reasonably within that authorized by the General Assembly, is a specific appropriation under Section 22 of Article II of the Constitution.”⁶⁶

An illustration of this concept appears in the appropriations for the Judiciary/Supreme Court that were made in the main operating appropriations act for the biennium ending June 30, 2009:

Continuing Judicial Education

The Continuing Judicial Education Fund (Fund 672) shall consist of fees paid by judges and court personnel for attending continuing education courses and other gifts and grants received for the purpose of continuing judicial education. The foregoing appropriation item 005-601, Continuing Judicial Education, shall be used to pay expenses for continuing education courses for judges and court personnel. If it is determined by the Administrative Director of the Supreme Court that additional appropriations are necessary, the amounts are hereby appropriated.⁶⁷



This is a specific appropriation in that the General Assembly has specified the purpose for which the money may be used.

Another illustration, which appears in the same act, concerns any appropriation that is insufficient to pay the amount of a final judgment rendered against the state by a court, or the amount of the settlement of a claim approved by a court, in an action arising out of a construction contract where the costs are payable in whole or in part from a state capital projects appropriation. In that case, the Director may apply to the Controlling Board to (1) make payment out of its Emergency Purposes appropriation or another appropriation for emergencies or contingencies or (2) increase or create an appropriation out of the unencumbered money credited to the capital projects fund from which the initial state appropriation was made. The amount of the increase or new appropriation is, the act states, “hereby appropriated from the applicable capital projects fund and made available for the payment of the judgment or settlement.”⁶⁸

Until November 23, 1977, the Emergency Board possessed the general statutory power, in case of “any deficiency in any of the appropriations for the expenses of an institution, department, or commission of the state for any biennial period, or in case of an emergency requiring the expenditure of money not specifically provided by law,” to authorize the agency “to create obligations within the scope of the

purpose for which such appropriations were made, or to expend money not specifically provided for by law.” The act that repealed these powers of the Emergency Board reenacted them, in substance, as powers of the Controlling Board.⁶⁹ As now constituted, R.C. 131.35 provides:

(1) If federal receipts into any fund of the state from which transfers of cash balances in excess of needs may be made under R.C. 127.14 are greater than the amount appropriated by the General Assembly for a specific purpose, the Controlling Board may authorize the expenditure of the excess federal money.

(2) If the nonfederal receipts of any such fund, or of the Waterways Safety Fund or the Wildlife Fund, are greater than the amount appropriated from it, the Board may increase the appropriation; however, the Board may not authorize more than 10% of additional spending from the Occupational Licensing and Regulatory Fund except to cover costs related to the examination or reexamination of applicants for a license, certificate, permit, card, etc.

(3) The Board may create additional funds to receive federal or nonfederal revenue not anticipated in an appropriations act for the biennium and may authorize the expenditure of such additional funds during the rest of the biennium in which the funds are created.

At first glance, these three provisions seem to be contrary to the prohibition against drawing money from the state treasury without a

Appropriations by the General Assembly need not be for specific amounts if the specific purpose is identified.




Although delegated broad powers, the Controlling Board may not take any action that does not carry out legislative intent.

specific appropriation “made by law.” However, the General Assembly that enacted R.C. 131.35 in 1977 endeavored to reconcile the new statute with the Constitution by including the following section in the main operating appropriations act for 1977-1979:

Section 32. Any moneys which the Controlling Board approves for expenditure pursuant to the provisions of Section 131.35 of the Revised Code as enacted in Am. Sub. S.B. 221 of the 112th General Assembly are

hereby appropriated for the period ending June 30, 1979.⁷⁰

Controlling Board authorization to expend money under R.C. 131.35 must accord not only with Article II, Section 22 of the Constitution, but also with the prohibition of R.C. 127.17 against the Board’s taking any action that does not carry out legislative intent “regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts” 

Endnotes

- ¹ 1914-1915 Ohio Laws 33, 100. The act made general appropriations for the 135-day period beginning February 16, 1915. It was a short transitional fiscal period leading to the adoption of a fiscal year beginning July 1 and ending the following June 30.
- ² Ohio General Assembly, *Senate Journal*, v. 107, 82d General Assembly, 677.
- ³ 1914-1915 Ohio Laws 100.
- ⁴ 1917 Ohio Laws 350.
- ⁵ 1892 Ohio Laws 407. At the time of its creation, the Emergency Board consisted of the Governor, Attorney General, Auditor of State, and the chairmen of the House and Senate Finance committees.
- ⁶ 1921 Ohio Atty.Gen.Ops. No. 2407.
- ⁷ 1975-1976 Ohio Laws 781.
- ⁸ 1989-1990 Ohio Laws 4312.
- ⁹ 1915 Ohio Laws 100.
- ¹⁰ R.C. 127.12.
- ¹¹ 1969 Ohio Appropriation Acts 64.
- ¹² Albert H. Rose, *Ohio Government: State and Local*, 4th ed. (Dubuque: Kendall/Hunt, 1974), 464; inferred from Legislative Service Commission, *Budget Preparation and Execution*, by David A. Johnston, David E. Watson, and James K. Tully, 1963, Staff Research Report no. 60, at 42-44.
- ¹³ R.C. 127.12.
- ¹⁴ R.C. 127.13. Although the Revised Code contains references to the “Legislative Budget Office,” the LBO was merged into LSC in 2000.
- ¹⁵ (1981), 66 Ohio St.2d 379, 389.



¹⁶ Controlling Board, *Controlling Board Manual*, 2007 at 12, available at: <http://www.ecb.ohio.gov/Documents/Substantive%20CB%20manual%20final.pdf>, last visited July 30, 2008.

¹⁷ R.C. 127.13.

¹⁸ *Controlling Board Manual* at 101.

¹⁹ R.C. 127.13.

²⁰ R.C. 111.15 and 119.01.

²¹ R.C. 127.13.

²² OAC 126:1-1-01.

²³ R.C. 127.13.

²⁴ *Controlling Board Manual* at 38-95.

²⁵ *Id.* at 95-96.

²⁶ *Id.* at 38, 96, and 101.

²⁷ *Id.* at 97.

²⁸ R.C. 103.23.

²⁹ R.C. 127.13.

³⁰ *Controlling Board Manual* at 12 and 100.

³¹ 1914-1915 Ohio Laws 100.

³² 1917 Ohio Laws 351.

³³ For examples, see 1953 Ohio Appropriation Acts 158; 1969 Ohio Appropriation Acts 64 to 68; R.C. 4981.10; 1981-1982 Ohio Laws 3397; and 1985-1986 Ohio Laws 3001.

³⁴ 1914-1915 Ohio Laws 100; R.C. 126.21.

³⁵ R.C. 127.13.

³⁶ For example, R.C. 126.15 provides that if the Director of Budget and Management determines that adjustments to the capital or operating budgets are required because of the reorganization of administrative agencies, transfer of programs, creation of new funds, modification of capital projects, or consolidation of funds, as authorized by an act of the General Assembly, the Director may transfer the appropriate amount between the funds involved.

³⁷ *Controlling Board Manual* at 16.

³⁸ 1927 Ohio Atty. Gen. Ops. No. 687.

³⁹ 66 Ohio St.2d at 386.

⁴⁰ Section 6 of Am. Sub. S.B. 240 of the 121st General Assembly.

⁴¹ *State, ex rel. McCaw, v. Ferguson* (1941), 139 Ohio St. 1, 6.

⁴² R.C. 127.15.

⁴³ Section 30 of Am. Sub. H.B. 283 of the 123rd General Assembly.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Section 99.02 of Am. Sub. H.B. 215 of the 122nd General Assembly (note: section is designated 98.02 in the act due to clerical error).

⁴⁷ R.C. 3317.01.

⁴⁸ *State, ex rel. Kauer, v. Defenbacher* (1950), 153 Ohio St. 268, 279.

⁴⁹ R.C. 1.60.



- ⁵⁰ R.C. 153.69.
- ⁵¹ *Columbus Blank Book Co. v. Maloon* (1963), 116 Ohio App. 393 (Syllabus branch 1).
- ⁵² A person who violated the prohibition might be expected to challenge its enforcement on the grounds that it allows recovery without limit as to amount, without proof of bad faith, and without evidence that the person improperly gained or that the state received less than full value for its expenditure.
- ⁵³ 1983-1984 Ohio Laws 2919.
- ⁵⁴ Ohio General Assembly, *Journal*, v. 140, 115th General Assembly, Appendices and General Index, 58.
- ⁵⁵ R.C. 127.16, 5103.12, 5501.311, and 5526.08.
- ⁵⁶ R.C. 126.14.
- ⁵⁷ Section 251.10 of Am. Sub. H.B. 562 of the 127th General Assembly.
- ⁵⁸ R.C. 4709.12, 4713.11, 4715.38, 4717.07, 4723.081, 4725.34, 4725.45, 4731.75, 4732.26, 4734.56, 4736.12, and 4759.08.
- ⁵⁹ R.C. 5907.13.
- ⁶⁰ R.C. 124.181.
- ⁶¹ R.C. 3333.18.
- ⁶² R.C. 1533.113.
- ⁶³ R.C. 3745.22.
- ⁶⁴ R.C. 4759.04.
- ⁶⁵ Section 375.30.25 of Am. Sub. H.B. 119 of the 127th General Assembly.
- ⁶⁶ *State, ex rel. Brown, v. Ferguson* (1972), 32 Ohio St.2d 245, 250.
- ⁶⁷ Section 313.10 of Am. Sub. H.B. 119 of the 127th General Assembly.
- ⁶⁸ Section 503.09 of Am. Sub. H.B. 119 of the 127th General Assembly.
- ⁶⁹ 1977-1978 Ohio Laws 725; R.C. 127.02 (repealed).
- ⁷⁰ 1977-1978 Ohio Appropriation Acts 513.

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