August 26, 2011

The Honorable Jeff Adkins
Gallia County Prosecuting Attorney
Gallia County Courthouse
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

SYLLABUS: 2011-032

The board of health of a general health district may not enter into a contract with a hospital whereby the services of the health commissioner of the district are leased to the hospital in exchange for a fee.

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OPINION NO. 2011-032

The Honorable Jeff Adkins
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Dear Prosecutor Adkins:

You have requested an opinion concerning a hospital using the services of the health commissioner of a general health district. In your letter, you explain:

> The Health Commissioner with the General Health District is currently in part-time status. A local health care provider would like to utilize the services of the Health Commissioner and is willing to pay approximately $150.00 per hour for his time. The Health Commissioner is not interested in profiting, personally, from this, but would upgrade his status with the General Health District to full-time, and spend half of his time as a "leased physician," with the profit going directly to the General Health District, to fund other local health care programs.

In light of this background, you wish to know whether the board of health of a general health district may enter into a contract with a hospital whereby the services of the health commissioner of the district are leased to the hospital in exchange for a fee. Resolution of your question requires us to examine the authority of a board of health of a general health district to lease the services of the health commissioner of the district to a hospital. In Ohio, it is well established that a board of health of a general health district is a creature of statute and thus has "only those powers expressly conferred by statute or necessarily implied from those expressly granted." 1996 Op. Att'y Gen. No. 96-028 at 2-102; *accord D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶¶38-40 (2002); *Browning-Ferris Indus. of Ohio, Inc. v. Mahoning County Bd. of Health*, 69 Ohio App. 3d 96, 100, 590 N.E.2d 61 (Franklin County 1990); 2009 Op. Att'y Gen. No. 2009-026 at 2-176; 2008 Op. Att'y Gen. No. 2008-026 at 2-278.

R.C. 3709.11 requires a board of health of a general health district to "appoint a health commissioner upon such terms, and for such period of time, not exceeding five years, as may be prescribed by the board." The powers and duties of a health commissioner of a general health district are as follows:

> [The health commissioner] shall be secretary of the board [of health], and shall devote such time to the duties of his office as may be fixed by contract with the board…. The commissioner shall be the executive officer of the board and shall carry out all orders of the board and of the department of health. [The commissioner] shall be charged with the enforcement of all sanitary laws and regulations in the district. The commissioner shall keep the public informed in regard to all matters affecting the health of the district.

R.C. 3709.11.

Nothing in the language of R.C. 3709.11 or elsewhere in the Revised Code expressly authorizes a board of health of a general health district to lease the services of the health commissioner of the district to a hospital. Nor are we aware of statutory powers from which such authority may be implied to make an express power of a board of health effective. *See generally D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d at ¶39 ("[s]uch grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, [it] follows, as a matter of course, that there can be no implied grant").

A board of health of a general health district is responsible for preserving the health and safety of persons in the district. 1981 Op. Att'y Gen. No. 81-079 at 2-311; *see* R.C. 3701.56; R.C. 3709.21-.22; R.C. 3709.26. *See generally* R.C. 3717.11 (a board of health may license retail food establishments and food service operations); R.C. Chapter 3733 (a board of health may regulate manufactured home parks, marinas, and agricultural labor camps); R.C. 3734.04 (a board of health may "provide for the inspection, licensing, and enforcement of sanitary standards for solid waste facilities"). To do this, a board of health has the authority to abate and remove all nuisances within its jurisdiction, *see* R.C. 3707.01; R.C. 3707.03, inspect the sanitary conditions of public buildings, *see* R.C. 3707.26; R.C. 3709.22; R.C. 3709.26, distribute antitoxin for the treatment of cases of diphtheria, *see* R.C. 3709.25, and make such orders and regulations as are necessary for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances, *see* R.C. 3707.01; R.C. 3709.20; R.C. 3709.21; R.C. 3714.12. A board of health may also offer vaccinations, *see* R.C. 3707.27, provide nursing care services, *see* R.C. 3709.15, provide infant welfare stations and prenatal clinics, *see* R.C. 3709.18, and provide free treatment for venereal diseases, *see* R.C. 3709.22; R.C. 3709.24.

While a board of health of a general health district has wide latitude when acting to protect the public health and prevent disease, "a board of health does not have unlimited authority to take whatever action it pleases" to accomplish these purposes. 2001 Op. Att'y Gen. No. 2001-017 at 2-99. As stated above, any action taken by a board of health of a general health district to protect the public health and prevent disease must reasonably effectuate an express power of the board of health. Because a board of health of a general health district does not have a statutory duty to provide personnel to staff a hospital and it is not necessary for a board of health to lease the services of the health commissioner of the district to a hospital to effectuate any duty imposed upon the board by law,

a board of health may not enter into a contract with a hospital whereby the services of the health commissioner of the district are leased to the hospital in exchange for a fee. *See* 2009 Op. Att'y Gen. No. 2009-026 at 2-176 ("the General Assembly did not intend in R.C. 3709.21 or elsewhere to grant boards of health 'unlimited,' 'plenary,' or 'unfettered' authority to adopt any rule deemed necessary for the public health. Rather, 'specific statutory authorization, beyond the general power set forth in R.C. 3709.21, is required before a local board of health can regulate in a certain area.' As noted above, there is no 'specific statutory authorization, beyond the general power set forth in R.C. 3709.21,' for boards of health to license solid waste haulers, and thus the authority to adopt licensure requirements may not be implied from R.C. 3709.21" (quoting *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d at ¶¶22, 25, 29, 41) (citations omitted)). *See generally* 1986 Op. Att'y Gen. No. 86-008 at 2-35 ("the authority of a municipality in annexation proceedings is purely statutory in nature. There is no statutory authority for a municipal corporation to offer the services of municipal employees … in order to assist township residents in seeking annexation pursuant to R.C. 709.02. Therefore, a municipality may not offer such services. The use of municipal employees … for the purpose of assisting residents of adjacent townships in proceeding with an application for annexation pursuant to R.C. 709.02 would exceed both the statutory and home rule powers of the municipality. Therefore, I conclude that a municipality may not offer the services of municipal employees … in order to assist township residents in seeking annexation pursuant to R.C. 709.02").

Moreover, if the General Assembly had intended to empower a board of health of a general health district to enter into a contract with a hospital whereby the services of the health commissioner of the district are leased to the hospital in exchange for a fee, it could have done so in language comparable to that used in other sections of the Revised Code. *See* 2009 Op. Att'y Gen. No. 2009-026 at 2-176 and 2-177; *see, e.g.*, R.C. 173.12; R.C. 307.15; R.C. 307.153; R.C. 339.75; R.C. 3313.72; R.C. 3701.04; R.C. 3703.01; R.C. 3709.085; R.C. 3709.281; R.C. 3748.13; R.C. 3750.03; R.C. 3781.10. *See generally Lake Shore Elec. Ry. Co. v. P.U.C.O*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the legislature had intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other connections); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 67, 69, 110 N.E. 627 (1915) (if the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result). *See generally also D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d at ¶¶23, 25 (the enactment of statutes that "explicitly and in great detail identify[] specific areas where local boards of health have substantive regulatory power to address public-health issues" "indicates that the General Assembly did not intend through R.C. 3709.21 to vest local boards of health with plenary authority to adopt any regulations that they deem necessary for the public health," for then such explicit statutes "would be rendered superfluous").

For example, a board of health of a general health district may authorize a school district to use the services of the health commissioner of the district by entering into a contract with a board of education of a city, exempted village, or local school district "for the purpose of providing the services of a school physician, dentist, or nurse." R.C. 3313.72. A board of health of a general health district is also authorized to enter into a contract with the Department of Aging or a local entity approved by the Department of Aging under R.C. 173.11 for the operation of a multipurpose senior center whereby the board of health provides "any or all of the services provided by the center." R.C. 173.12(B)(4).

That the General Assembly did not include any language in the Revised Code authorizing a board of health of a general health district to enter into a contract with a hospital whereby the services of the health commissioner of the district are leased to the hospital indicates the General Assembly's intent that a board of health may not enter into such a contract. Accordingly, the board of health of a general health district may not enter into a contract with a hospital whereby the services of the health commissioner of the district are leased to the hospital in exchange for a fee.

In conclusion, it is my opinion, and you are hereby advised that the board of health of a general health district may not enter into a contract with a hospital whereby the services of the health commissioner of the district are leased to the hospital in exchange for a fee.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General