December 22, 1993

OPINION NO. 93-070

The Honorable Robert L. Becker
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

Dear Prosecutor Becker:

You have requested an opinion on the following question:

> Are the Licking County Commissioners authorized by the Ohio Revised Code to operate a "cafeteria" benefit plan as described by Internal Revenue Code Section 125, a part of which involves a flexible benefit account which permits an employee or elected official to choose to waive coverage and, instead of receiving medical benefits, receive a cash payment in an amount less than the cost of the insurance premium[?][1] (Footnote added.)

Authority of Board of County Commissioners to Prescribe Fringe Benefits, Including Health Care Coverage, for County Officers and Employees

It is well settled that a board of county commissioners is a creature of statute with only those powers expressly granted by statute or necessarily implied from such express powers. *State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). It is, therefore, necessary to determine whether any statute authorizes a board of county commissioners to provide the type of benefit you describe for county employees or for county officers.[2]

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[1] The term "cafeteria plan," as used in 26 U.S.C. §125, is defined as meaning, with certain exceptions, a written plan under which all participants are employees and which allows participants to choose among two or more benefits consisting of cash and qualified benefits. 26 U.S.C. §125(d)(1) (Supp. IV 1992). 26 U.S.C. §125(a) (Supp. IV 1992) provides generally, with certain exceptions, that "no amount shall be included in the gross income of a participant in a cafeteria plan solely because, under the plan, the participant may choose among the benefits of the plan."

[2] Except in those instances where a board of county commissioners is the appointing authority

R.C. 305.171

The provision of health care and insurance benefits for county officers and employees is governed by R.C. 305.171, which states in pertinent part:

> (A) The board of county commissioners of any county may contract for, purchase, or otherwise procure and pay all or any part of the cost of *group insurance policies that may provide benefits including, but not limited to*, hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, or prescription drugs, and that may provide sickness and accident insurance, group legal services, or group life insurance, or a combination of any of the foregoing types of insurance or coverage for county officers and employees and their immediate dependents from the funds or budgets from which the officers or employees are compensated for services, issued by an insurance company, a medical care corporation organized under [R.C. Chapter 1737], or a dental care corporation organized under [R.C. Chapter 1740].
> (B) The board also may negotiate and contract for any plan or plans of group insurance or health care services with health care corporations organized under [R.C. Chapter 1738] and health maintenance organizations organized under [R.C. Chapter 1742], provided that each officer or employee shall be permitted to do both of the following:
> (1) Exercise an option between a plan offered by an insurance company, medical care corporation, or dental care corporation, and such plan or plans offered by health care corporations or health maintenance organizations under this division, on the condition that the officer or employee shall pay any amount by which the cost of the plan chosen by such officer or employee pursuant to this division exceeds the cost of the plan offered under division (A) of this section;
> (2) Change from one of the plans to another at a time each year as determined by the board.
> ....
> (E) The board of county commissioners may provide the benefits described in divisions (A) to (D) of this section through an individual self-insurance program or a joint self-insurance program as provided in [R.C. 9.833].[3] (Emphasis and footnote

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of specific county employees, the board has only limited authority to prescribe compensation, including fringe benefits such as health insurance, for county employees. 1984 Op. Att'y Gen. No. 84-092. Similarly, a board of county commissioners has limited authority to prescribe fringe benefits for county officers, who are entitled to receive only that compensation prescribed by statute. 1984 Op. Att'y Gen. No. 84-058.

[3] R.C. 305.171(C) and (D) concern the provision of benefits through a jointly administered health and welfare trust fund. Because the information provided with your opinion request does not mention the county's participation in such a fund, the provisions of R.C. 305.171(C) and (D) will not

added.)

R.C. 305.171(A) thus authorizes a board of county commissioners to obtain and pay for all or any portion of the cost of "group insurance policies" that may provide benefits, including, but not limited to, the benefits listed therein. The manner in which a board of county commissioners may provide benefits under R.C. 305.171(A) is specified as being through "group insurance policies" issued by an insurance company, a medical care corporation organized under R.C. Chapter 1737, or a dental care corporation organized under R.C. Chapter 1740. In addition, R.C. 305.171(B) authorizes a board of county commissioners, subject to certain restrictions, to negotiate and contract for group insurance or health care services plans with health care corporations organized under R.C. Chapter 1738 and health maintenance organizations organized under R.C. Chapter 1742. Division (E) of R.C. 305.171 authorizes a board of county commissioners to provide the benefits described in divisions (A) through (D) by an alternate method, *i.e.*, through an individual self-insurance program or a joint self-insurance program as provided in R.C. 9.833.[4]

Although R.C. 305.171 permits boards of county commissioners certain discretion in determining the specific benefits to be provided to county personnel under that statute, it expressly limits the means by which such benefits may be provided, and also specifies the entities from whom such benefits may be obtained. For example, R.C. 305.171 was recently amended to add division (E) for the purpose of permitting boards of county commissioners the alternative of providing the benefits described in R.C. 305.171(A)-(D) through an individual self-insurance program or a joint

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be addressed in this opinion.

[4] R.C. 9.833(B) authorizes political subdivisions, including counties, *see* R.C. 9.833(A), that provide health care benefits for their officers or employees to do any of the following:

> (1) Establish and maintain an individual self-insurance program with public moneys to provide authorized health care benefits in accordance with division (C) of this section;
> (2) After establishing an individual self-insurance program, agree with other political subdivisions that have established individual self-insurance programs for health care benefits, that their programs will be jointly administered in a manner specified in the agreement;
> (3) Pursuant to written agreement and in accordance with division (C) of this section, join in any combination with other political subdivisions to establish and maintain a joint self-insurance program to provide health care benefits;
> (4) Pursuant to a written agreement, join in any combination with other political subdivisions to procure or contract for policies, contracts, or plans of insurance to provide health care benefits for their officers and employees subject to the agreement;
> (5) Use in any combination any of the policies, contracts, plans, or programs authorized under this division.

self-insurance program as specified in R.C. 9.833, as opposed to providing such benefits in the manner prescribed by R.C. 305.171(A)-(D). 1989 - 1990 Ohio Laws, Part IV, 6412, 6418 (Am. Sub. H. B. 737, eff. April 11, 1991).

Nothing in R.C. 305.171 expressly authorizes a board of county commissioners to offer a county officer or employee the option of choosing a cash payment instead of receiving coverage under a group insurance policy offered under R.C. 305.171(A) or a plan of group insurance or health care services under R.C. 305.171(B). Similarly, nothing in R.C. 305.171(E) or R.C. 9.833 expressly authorizes a board of county commissioners to offer its officers and employees a cash payment option in lieu of coverage under a benefit plan established in accordance with those statutes.

Because the General Assembly has described in such detail the means by which a board of county commissioners may provide benefits to county officers and employees under R.C. 305.171, it is doubtful that the General Assembly intended implicitly to authorize a board of county commissioners to offer a cash payment option as part of a program offered under that statute. As stated in 1983 Op. Att'y Gen. No. 83-042 at 2-162:

> [A] public body, such as a board of county commissioners, may expend public funds only pursuant to clear statutory authority. Any doubt as to the authority to make an expenditure must be resolved against the expenditure. *See State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916).

Thus, the authority of a board of county commissioners to offer a cash payment option in lieu of receiving benefits offered to county personnel in accordance with R.C. 305.171 may not be inferred from the language of R.C. 305.171.

Further, no other statute authorizes a board of county commissioners to offer a cash payment option to county personnel who choose not to receive benefits provided in accordance with R.C. 305.171.[5] In the absence of such a statute, one cannot conclude that a board of county commissioners is authorized to offer that option.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, a board of county commissioners is not authorized by statute to offer county officers or employees the option of receiving a cash payment in lieu of receiving benefits otherwise provided to county personnel under R.C. 305.171.

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[5] This is not to say that a county officer or employee may not refuse coverage under a benefit plan offered by the county under R.C. 305.171, but only that the board of county commissioners is without authority to provide a cash payment to anyone who chooses not to be covered under such a plan.

Respectfully,

LEE FISHER
Attorney General

December 22, 1993

The Honorable Robert L. Becker
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

SYLLABUS: 93-070

A board of county commissioners is not authorized by statute to offer county officers or employees the option of receiving a cash payment in lieu of receiving benefits otherwise provided to county personnel under R.C. 305.171.