February 11, 2000

OPINION NO. 2000-002

The Honorable Rebecca J. Ferguson
Preble County Prosecuting Attorney
103 N. Barron Street
Eaton, Ohio 45320

Dear Prosecutor Ferguson:

You have asked whether a board of county commissioners may authorize the use of county funds to pay, on behalf of all elected county officials, the filing fee required by R.C. 102.02(E)(2).

By way of background, R.C. 102.02(A) requires various public officers and employees, and candidates for public office, to file with the appropriate ethics commission a personal financial disclosure statement reporting the filer's sources of income, investments, real property holdings, debtors and creditors, sources of gifts, and other specified information. Included among those who are required to file are persons elected to, or candidates for, county office and persons who are appointed to fill a vacancy for an unexpired term in county elective office. R.C. 102.02(E) requires each financial disclosure statement to be accompanied by a filing fee, and division (E)(2) governs payment of the fee by elected officeholders and candidates for elective office.[1]

In responding to your question, we must keep in mind the well-established principle that a board of county commissioners has only those powers conferred by statute, either expressly or by necessary implication. *See State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). The board of county commissioners may expend public funds only pursuant to clear statutory authority and 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).

There is no statute expressly giving the board of county commissioners the authority to use county funds to pay on behalf of all elected county officials the filing fee required under R.C.

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[1] R.C. 102.02(E)(2) provides that the filing fee for a person holding a county office or a candidate therefor is twenty-five dollars.

102.02(E)(2). In the absence of such express authority, we must determine whether the board has any statutory power from which the authority may be implied.

It is helpful to first examine 1983 Op. Att'y Gen. No. 83-042, which analyzed the ability of a board of county commissioners to have the county pay on behalf of the county prosecuting attorney, an elected county officer, R.C. 309.01, the attorney registration fee required by the Ohio Supreme Court, in the absence of express statutory authority for such payment. The opinion determined as an initial matter that payment of the fee could be considered a fringe benefit that constituted "compensation" since such payment would "benefit and enrich" the officeholder, and then examined whether the board had the authority to fix the prosecutor's compensation, as a possible basis for implying authority to pay the registration fee. *See Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (a county board's power to employ authorizes it to fix the compensation of its employees, including fringe benefits, absent any statute constricting such authority); 1998 Op. Att'y Gen. No. 98-028 (a board, office, or other agency of a political subdivision with the statutory authority to compensate its employees has the authority to set fringe benefits for its employees so long as such benefits are equal to or greater than any statutory entitlements, subject to any statutory limitations on the appointing authority's power to fix compensation or on the granting of the particular benefit).

1983 Op. Att'y Gen. No. 83-042 explained at 2-162 that, unlike the compensation of county employees, the compensation of elected county officers is set by statute,[2] and that while the board of county commissioners may have express statutory authority in certain limited circumstances to provide specific fringe benefits to county officers, *see, e.g.,* R.C. 305.171 (group insurance), it has no general authority to set the compensation of the county prosecuting attorney. *See also* 1989 Op. Att'y Gen. No. 89-003 at 2-14 ("[p]ublic officers whose compensation is set by statute may not receive fringe benefits unless such benefits are specifically or impliedly authorized by law"); 1984 Op. Att'y Gen. No. 84-036 at 2-114 ("those officers whose compensation is set by statute are not entitled to fringe benefits not provided by statute"). The opinion concluded that because the board had no authority to fix the compensation of the elected officers, the board could not be deemed to have the implied authority to approve payment of the registration fee as a fringe benefit for the prosecuting attorney. *Id.*

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[2] *See* R.C. Chapter 325 (setting forth the compensation for each of the elected county officers). Preble County has not adopted a charter prescribing its form of government pursuant to Ohio Const. art. X, §§ 3 and 4 or adopted an alternative form of government pursuant to Ohio Const. art. X, § 1 and R.C. Chapter 302. Such counties have greater authority than statutory counties to set the compensation of their officers. *See Blacker v. Wiethe*, 16 Ohio St. 2d 65, 242 N.E.2d 655 (1968); 1989 Op. Att'y Gen. No. 89-003; 1985 Op. Att'y Gen. No. 85-039. *See also Village of Bellville v. Beal*, 7 Ohio App. 3d 291, 455 N.E.2d 683 (Richland County 1982); 1983 Op. Att'y Gen. No. 83-036.

Applying the analysis of 1983 Op. Att'y Gen. No. 83-042 to your question, we conclude that, because the board of county commissioners has no authority to fix the compensation of elected county officers, it has no implied authority to use county funds to pay the filing fee required under R.C. 102.02(E) as a fringe benefit for county officers. [3]

1983 Op. Att'y Gen. No. 83-042 also recognized at 2-162 that, apart from the authority to fix compensation, a board of county commissioners could pay the attorney registration fee on behalf of the county prosecutor "if such payment is necessarily incidental to the performance of a function or the exercise of a power conferred upon the county by statute." In the case of the attorney registration fee, the opinion could find no "statutorily imposed function or power to which the payment of such fee is necessary." 1983 Op. Att'y Gen. No. 83-042 at 2-164. Similarly, we are unaware of any express statutory duty or power of the county to which payment of the filing fee would be incidental.

We note that, even if the board of county commissioners had the authority to set the compensation of elected officers or other statutory power from which the authority to pay the filing fee could be implied, R.C. 102.02(E)(2) includes language constricting the ability of the commissioners to authorize payment of the fee from county funds. R.C. 102.02(E)(2), which covers the filing fee to be paid by county officers and candidates, specifically states that the filing fee is "to be paid *by the person* who is elected or appointed to or is a candidate for" county office (emphasis added). This language is in contrast to the language of division (E)(4), which reads:

> For any public official who is appointed to a nonelective office of the state and for any employee who holds a nonelective position in a public agency of the

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[3] The establishment of compensation by a board of county commissioners for elected county officers, in the absence of clear statutory authority providing definite direction or a uniform rule for fixing such compensation in all counties statewide, implicates Ohio Const. art. II, § 20 (stating that the General Assembly, in cases not otherwise provided for in the Constitution, "shall fix the term of office and the compensation of all officers") and Ohio Const. art. II, § 26, (requiring laws of a general nature to have uniform operation throughout the state). *See Neff v. Board of County Comm'rs*, 166 Ohio St. 360, 362, 142 N.E.2d 658, 659 (1957) (quoting *State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917), "[t]he General Assembly of Ohio cannot delegate the authority conferred upon it by Section 20 of Article II of the Constitution, to fix the compensation of officers," and regarding county elective officers, "an act of the General Assembly relating to the fixing of their salaries is a law of a general nature and must operate uniformly throughout the state"). *Cf. Blacker v Wiethe* (a board of county commissioners in a county that has adopted an alternative form of government under Ohio Const. art. X, § 1 and R.C. Chapter 302 may fix the salary of a county officer).

> state, the state agency that is the primary employer of the state official or employee shall pay the fee required under division (E)(1) or (F) of this section.

See generally Metropolitan Securities Co. v. Warren State Bank, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"); *Kiefer v. State of Ohio*, 106 Ohio St. 285, 139 N.E. 852 (1922). Because R.C. 102.02(E)(2) specifically requires that a filer covered thereunder pay the fee himself, it acts as constricting authority upon any implied power the board of county commissioners might have to provide for payment of the fee from county funds on behalf of county officers.

We also note that Ohio Const. art. II, § 20, which prohibits any change in a public officer's compensation during his existing term of office, prohibits an incumbent officeholder, including an elected county officer, from receiving fringe benefits that were authorized during his term of office. *See State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976); 1989 Op. Att'y Gen. No. 89-087; 1984 Op. Att'y Gen. No. 84-069. Therefore, even if the board of county commissioners had the statutory authority to pay the filing fee on behalf of elected county officers as a fringe benefit, incumbent officeholders would be prohibited from receiving the benefit during their current term of office.[4]

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[4] 1980 Op. Att'y Gen. No. 80-002 (overruled, in part, by 1983 Op. Att'y Gen. No. 83-036 and 1981 Op. Att'y Gen. No. 81-099) advised that a county's purchase of liability insurance covering suits brought against county officers in their official capacity was not "compensation" to the officers for purposes of Ohio Const. art. II, § 20, even though it acted to insulate their personal financial situation, stating at 2-16 that "a public officer could not fairly be expected to procure such liability insurance but for his official status."

It is true that a county elected officer would not be required to file a financial disclosure statement and pay the accompanying fee if he did not hold such office. However, the conclusion in 1980 Op. Att'y Gen. No. 80-002 that a county may provide liability insurance to elected officeholders, including incumbents, may be distinguished on two grounds from payment of the filing fee.

First, counties have the express statutory authority to purchase liability insurance. The issue in the 1980 opinion was only whether county officers currently in office were prohibited from receiving the insurance as an in-term increase in compensation. In this instance, the board of county commissioners has no statutory authority to pay the officers' filing fee.

Second, the opinion noted at 2-15 that a suit brought against a public officer in his official capacity is really a suit against the governmental entity itself, and that "[l]iability insurance covering this sort of suit directly benefits the government only, not the official."

In your opinion request, you cite Ohio Elections Commission Advisory Opinion No. 97ELC-03, wherein the Elections Commission concluded that payment of the filing fee required by R.C. 102.02(E)(2) is an appropriate expenditure from a county commissioner's campaign committee fund under R.C. 3517.13(O)(2). This section permits reimbursement from a campaign fund for expenses incurred "in connection with duties as the holder of a public office." In determining whether the expense was one incurred by the county commissioner "in connection with [his] duties as the holder of a public office," the Elections Commission applied a "but for" test, explaining that "[t]his doctrine holds that an expenditure is appropriate in a situation where the office holder would not be making the expenditure, but for the fact the person is holding that office."

Whether an elected officer's campaign funds may be used to pay the filing fee required by R.C. 102.02(E) is not, however, determinative of whether county funds may be used to pay the filing fee. In addressing your question, the pertinent inquiry is whether a board of county commissioners has the statutory authority to pay such fee, and not whether the county officers would be required to pay the fee "but for" their holding public office.[5] In the absence of a statute expressly or impliedly authorizing a board of county commissioners to pay the filing fee required by R.C. 102.02(E)(2) on behalf of county elected officers, and in light of the requirement in R.C. 102.02(E)(2) that the filing fee is "to be paid by the person who is elected or appointed to" a county office, we conclude that the county commissioners have no authority to use county funds to pay the filing fee required by R.C. 102.02(E)(2) on behalf of a county elected official.

Although the insurance protects the officer's personal assets, "the primary purpose of such insurance is generally the convenience of government." *Id*.

Even if, in this instance, the board of county commissioners had the statutory authority to pay the filing fee, we believe such payment would constitute compensation for purposes of Ohio Const. art. II, § 20. Even though a county officer would not be required to file the financial disclosure statement and pay the associated fee if not for the fact that he held office, the obligation to file the statement with an accompanying filing fee remains essentially a personal obligation on the part of the officeholder. *See* R.C. 102.99 (knowingly failing to timely file a financial disclosure statement is a fourth degree misdemeanor and knowingly filing a false statement is a first degree misdemeanor). Payment of the fee is in no way intended to meet the needs of the county, and if the county were to pay the fee on behalf of the officer, it would relieve the officer of the responsibility to do so, thereby enriching and benefiting him. *See State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976).

[5] We do note that the "but for" test appeared in 1980 Op. Att'y Gen. No. 80-002, as discussed in note 4, *supra*. However, as explained, the test was not applied until after the opinion initially determined the board of county commissioners had the statutory authority to purchase liability insurance.

Therefore, it is my opinion, and you are so advised that, a board of county commissioners may not authorize the use of county funds to pay on behalf of all elected county officers the fee that must accompany a county officer's financial disclosure statement pursuant to R.C. 102.02(E)(2).

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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