July 6, 2010

The Honorable Laina Fetherolf
Hocking County Prosecuting Attorney
88 South Market Street
Logan, Ohio 43138

SYLLABUS: 2010-017

The cost of a county employee's health insurance premium may be paid from special fund monies in the same proportion that the employee's salary is eligible to be paid from the special fund monies. Alternatively, the cost of a county employee's health insurance premium may be paid entirely from the county general fund.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

July 6, 2010

OPINION NO. 2010-017

The Honorable Laina Fetherolf
Hocking County Prosecuting Attorney
88 South Market Street
Logan, Ohio 43138

Dear Prosecutor Fetherolf:

You have requested an opinion whether the cost of health insurance premiums paid by counties on behalf of county employees must be apportioned among the funds such employees' salaries are paid from in direct proportion to the amount of salary paid from each fund, or whether the entire cost of the health insurance premium may be paid from just one fund from which an employee's salary is paid. As you note in your request letter, your questions are prompted by the fact that some county employees are paid from a combination of both the general and some special fund. For the reasons that follow, we conclude that the cost of a county employee's health insurance premium may be paid from special fund monies in the same proportion that the employee's salary is eligible to be paid from the special fund monies. Alternatively, the cost of a county employee's health insurance premium may be paid entirely from the county general fund.

Before addressing your specific question, it is helpful to review the statutory framework for general and special revenue funds and highlight how such funds can be used. To begin, R.C. 5705.03 gives the county authorization to levy and collect taxes, and R.C. 5705.05 explains the purpose of the general levy for current expenses:

> The purpose and intent of the general levy for current expenses is to provide *one general operating fund* derived from taxation *from which any expenditures for current expenses of any kind may be made*. The taxing authority of a political subdivision may include in such levy the amounts required for carrying into effect any of the general or special powers granted by law to such subdivision…. (Emphasis added.)

In the case of a county, the proceeds of the general levy for current expenses are kept in a county general fund. R.C. 5705.10(A). R.C. 5705.09 requires the establishment of the general and various special funds:

> Each subdivision shall establish the following funds:
> (A) General fund;
> ….
> (D) A special fund for each special levy;
> (E) A special bond fund for each bond issue;
> (F) A special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose;
> ….

Further, R.C. 5705.12 allows a subdivision to establish "with the approval of and in the manner prescribed by the auditor of state" such additional special funds "as are desirable, and [the taxing authority of a subdivision] may provide by ordinance or resolution that money derived from specified sources other than the general property tax shall be paid directly into such funds." R.C. 5705.12.[1] In addition, counties and other subdivisions, as defined for purposes of R.C. Chapter 5705, *see* R.C. 5705.01(A), are required to create and maintain special funds for moneys derived from sources other than the general property tax and required by law to be used for a specific purpose. R.C. 5705.09(F); *Cincinnati v. Hamilton County Budget Comm'n*, 25 Ohio St. 3d 137, 495 N.E.2d 396 (1986).

As explained above, "where the use of money paid into the [county] general fund is not restricted to a specific use, the use is limited only to a proper county purpose." 1981 Op. Att'y Gen. No. 81-035, at 2-135. In contrast, a board of county commissioners does not have the same authority to expend moneys in special funds as it does the moneys in a county's general revenue fund. *Madden v. Bower*, 20 Ohio St. 2d 135, 138, 254 N.E.2d 357 (1969). In *Madden v. Bower*, the Ohio Supreme Court considered whether a "county auditor has a duty to charge each special

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[1] *See, e.g.*, R.C. 311.29(D) (creating the "sheriff's policing revolving fund"); R.C. 313.16 (creating a special fund to finance county use of another county coroner's laboratory); R.C. 323.32(B) (creating the "undivided bankruptcy claims fund" for payments received in settlement of claims arising from the reorganization plan of a bankrupt railroad company); R.C. 955.20 (creating a special fund known as "the dog and kennel fund"); R.C. 5705.19 (permitting tax levies for numerous special purposes, with the proceeds of such levies deposited in special funds pursuant to R.C. 5705.09 (D)). *See also* 1986 Op. Att'y Gen. No. 86-103 (syllabus, paragraph 1) ("[a]ll revenue derived from a special tax levied pursuant to R.C. 5705.19(L), for the support of the county board of mental retardation and developmental disabilities … must, pursuant to R.C. 5705.10, be placed in a special fund established pursuant to R.C. 5705.09(D) for the purposes for which the tax was levied").

fund of the county from which certain employees are regularly compensated with a proportionate share of the insurance premium cost attributable to those employees." *Id.* at 137. In its opinion, the court highlighted the distinction between a board's authority to expend moneys in special funds and its authority to expend the moneys in a county's general revenue fund:

> [A] solution to the main problem at hand cannot be extracted merely from the four corners of former [R.C. 305.171]. Necessarily involved is a consideration of those special funds of the county, the receipts and expenditures of which are commanded by law, as distinguished from those funds which are under the control, more or less, of the Board of County Commissioners as the taxing and appropriating authority of the county.

Madden v. Bower at 138.[2] *See also* R.C. 5705.10(H) ("[m]oney paid into any fund shall be used only for the purposes for which such fund is established"). Thus, the proper expenditure of special fund monies depends, in part, upon the special fund involved and the statutory or constitutional restrictions on the use of that fund.[3]

We now turn to a brief review of the powers of county officers and specifically those persons holding the office of county commissioner, as created in R.C. 305.01. It is well established that a board of county commissioners is a creature of statute that may exercise only those powers explicitly conferred by statute or necessarily implied by those powers that are expressly granted. *State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); 1986 Op. Att'y Gen. No. 86-083. *See also Elder v. Smith*, 103 Ohio St. 369, 370, 133 N.E. 791 (1921) (a "board of county commissioners has such powers and jurisdiction, and only such, as are conferred by statute"); *Schultz v. Erie County Metro. Park Dist. Bd.*, 26 Ohio Misc. 68, 269 N.E.2d 72 (C.P. Erie County 1971). The authority to employ county personnel includes the power to fix their compensation, including fringe benefits, subject to any statutory restrictions on that power.[4] 2008 Op. Att'y Gen. No. 2008-012, at 2-137. *See Ebert v. Stark*

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[2] The litigation in *Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969), began before the effective date of a 1969 amendment to R.C. 305.171, so the court's opinion refers to R.C. 305.171 as it was enacted.

[3] Ohio Const. art. XII, § 5 states that "every law imposing a tax shall state, distinctly, the object of the same, *to which only, it shall be applied*." (Emphasis added.) *See also, e.g.*, Ohio Const. art. XII, § 5a (restricting the expenditure of "moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles" to "costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws," and other named purposes related to travel on public highways).

[4] A board of county commissioners has authority to appoint and determine the compensation of certain employees, *see, e.g.*, R.C. 305.13 (clerk); R.C. 305.14 (legal counsel);

County Bd. of Mental Retardation, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098 (1980). *See also* 2007 Op. Att'y Gen. No. 2007-012, at 2-103 ("[t]he statutory authority to fix 'compensation' includes the authority to establish both salary and fringe benefits, such as medical insurance, life insurance, and paid leave, in the absence of any statute that constricts such authority, and so long as such benefits are in excess of any minimum levels established by statute"); 1978 Op. Att'y Gen. No. 78-029, at 2-69 ("[s]ince insurance premium payments are a form of compensation, authorization for such payments may be made by the officer or board with the statutory power to fix the employees' compensation").

R.C. 305.171(A) gives a board of county commissioners the power to "contract for, purchase, or otherwise procure and pay all or any part of the cost of group insurance policies that may provide [health care] benefits … for county officers and employees … from the funds or budgets from which the county officers or employees are compensated for services." *See also* 1995 Op. Att'y Gen. No. 95-027, at 2-138 ("R.C. 305.171 authorizes a board of county commissioners to procure and pay all or any part of the cost of group health insurance policies for county officers and employees and their immediate dependents"). Thus, a board of county commissioners, if it elects to pay all or any part of the cost of county employees' health insurance policies, is required to pay the insurance premiums from the same funds or budgets from which the employees' salaries are paid.

Your question arises at this point, asking whether, if a county employee's salary is paid from multiple funds, the cost of the employee's health insurance premium must be paid from those funds in direct proportion to the amount of the employee's salary paid from each fund.

First, we must consider that because health insurance is a benefit of employment, it is considered part of an employee's compensation, and the cost of an employee's health insurance premium is thus treated the same as an employee's salary for purposes of your question. That is, the cost of a health insurance premium paid by an employer on behalf of an employee is included in compensation. *See Madden v. Bower* at 137 ("as to each employee receiving the right to the

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R.C. 305.15 (engineer), but most county employees are appointed by other county officers. Those officers set the compensation of any employees they appoint. *See* R.C. 325.17 (authorizing the county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, and county recorder to "employ the necessary … employees for their respective offices" and "fix the compensation of those employees"). *See generally* 2008 Op. Att'y Gen. No. 2008-012 (concerning the authority of a board of county commissioners to determine the compensation of county employees for whom the board is not the appointing authority). Nonetheless, the aggregate amount of compensation for all of the employees in any county office is fixed by the board of county commissioners, so though the board of county commissioners does not set the compensation for any single employee, it does control the amount of money set aside for compensation of all of a given county office's employees in the aggregate.

benefits of the [health] insurance, the [health insurance policy] premium is a part of the cost of the public service performed by such employee"); *accord Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692 (1976) ("the payment of [health insurance] premiums for the benefit of a public official must be considered a part of the compensation for that office"); 1978 Op. Att'y Gen. No. 78-029. In *Parsons*, the court noted that while payments for fringe benefits such as health insurance "may not constitute 'salary,' in the strictest sense of that word, … they are compensation." *Parsons v. Ferguson*, 46 Ohio St. 2d at 391. *But cf. State ex rel. Artmayer v. Bd. of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975) (syllabus) ("[t]he terms 'salary' and 'compensation,' as used in Section 20, Article II of the Ohio Constitution, are synonymous"). Thus, in answering your question, the cost of an employee's health insurance premium is treated in the same way as the employee's salary would be treated; both are part of an employee's compensation as a whole.

When an employee performs work that may be compensated in part from the general fund and in part from a special fund, we have advised that special fund monies can only be used to compensate the employee for the portion of work within the purview of the special fund's established purposes. *See* 2004 Op. Att'y Gen. No. 2004-036 (syllabus, paragraph 2). In that opinion, the Attorney General considered the question of how to compensate township trustees and fire district employees who spend a portion of their working time on ambulance and emergency medical services. If a township that provides emergency medical and rescue services charges for the use of those services, it must create a special "ambulance and emergency medical services fund" (EMS Fund) to keep such monies. 2004 Op. Att'y Gen. No. 2004-036, at 2-323. The EMS Fund was, at the time of the 2004 opinion, only for costs related to ambulance and emergency medical services in the township. The Attorney General explained that the township trustees and fire district employees should document how they spend all of their working time in order to determine the portion of their work eligible to be paid from the EMS Fund. The Attorney General further advised that "[t]ownship payments … for employees' health insurance may be made from the ambulance and emergency medical services fund in the same proportion that the employee's salary is eligible for payment from the fund." 2004 Op. Att'y Gen. No. 2004-036 (syllabus, paragraph 2). These principles are equally applicable to your question. That is, if a county employee's salary may be paid from a special fund, the cost of the employee's health insurance premium may be paid, in the same proportion, from the special fund.

Accordingly, when a board of county commissioners considers and applies these principles to each county employee who is paid in the way you describe, in part from the general fund and in part from some special fund, it must be determined first how much of an employee's base salary may be paid from the special fund involved. Such a determination will depend on the amount of time an employee devotes to purposes properly related to that fund. For example, if an employee devotes ten percent of the working period to a purpose attached to a special fund, then ten percent of an employee's salary may be paid from that special fund, and it follows that ten percent of the cost of that employee's health care premium may be paid from the same special fund. Alternatively, a board of county commissioners has the authority to pay from the general fund all of an employee's compensation, including the cost of an employee's health

insurance premium. *See* R.C. 5705.05 ("any expenditures for current expenses of any kind may be made" from the general fund).

In sum, it is my opinion, and you are hereby advised that the cost of a county employee's health insurance premium may be paid from special fund monies in the same proportion that the employee's salary is eligible to be paid from the special fund monies. Alternatively, the cost of a county employee's health insurance premium may be paid entirely from the county general fund.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General