

## OPINION NO. 73-086

## Syllabus:

1. A board of county commissioners may not, by grant or by separate contract for emergency services, make payments from a special levy under R.C. 5705.191 to the lessee of a county general hospital to cover the costs of hiring additional doctors to staff the emergency room of the hospital.

2. The board of county commissioners may, however, pursuant to a provision in the lease agreement, entered under R.C. 339.09, make such payments from the proceeds of the levy submitted to the voters under R.C. 5705.191.

To: Eugene R. Weir, Coshocton County Pros. Atty., Coshocton, Ohio

By: William J. Brown, Attorney General, August 28, 1973

Your request for my opinion poses the following questions:

1. May the Commissioners of Coshocton County submit to the Electors of said County the issue of a 1 Mill tax levy for health purposes and give the entire proceeds thereof to the Coshocton Memorial Hospital, Inc., a corporation not for profit that has leased the county hospital facilities pursuant to Section 339.08 of the Revised Code of Ohio, such proceeds to be used by the Trustees of the corporation to employ doctors who will be engaged solely in the practice of medicine in the Emergency Room of the hospital and shall be employees of said Board of Trustees?

2. In the event your answer to question number 1 is in the negative, may the Board of County Commissioners contract with the Board of Trustees of the Coshocton Memorial Hospital, Inc. to provide emergency service and pay for such service from the proceeds of a tax levy submitted to the voters under Section 5705.191 of the Revised Code of Ohio, for health purposes?

R.C. 5705.191, pursuant to which the proposed levy would be submitted to the voters, provides in part:

The taxing authority of any subdivision, other than the board of education of a school district, by a vote of two-thirds of all its members, may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation by levies on the current tax duplicate will be insufficient to provide an adequate amount for the necessary requirements of the subdivision, and that it is necessary to levy a tax in excess of such limitation for any of the purposes in section 5705.19 of the Revised Code, or to supplement the general fund for the purpose of making appropriations for one or more of the following purposes: relief, welfare, hospitalization, health, and support of general or tuberculosis hospitals, and that the question of such additional tax levy shall be submitted to the electors of the subdivision at a general, primary, or special election to be held at a time therein specified. \* \* \*

(Emphasis added.)

Your questions concern the authority of the county commissioners to use these funds to cover the additional costs of emergency service provided by the corporation. Specifically the costs relate to the hiring of doctors to staff the emergency room under an expanded program of services.

While your question refers to a levy for "health" purposes a more appropriate purpose under R.C. 5705.191 would be the "support of general or tuberculosis hospitals." I am aware of the syllabus of Opinion No. 60-089, Opinions of the Attorney General for 1969, which prohibits payments from the proceeds of such a levy to a general hospital run by a not for profit corporation. However, my predecessor in the body of that opinion supports that statement only as to hospitals owned, as well as operated, by the nonprofit corporation. Relying on Opinion No. 394, Opinions of the Attorney General for 1945, he concluded that "as used in the context of Section 5705.191, Revised Code, support of a general hospital is support of a general hospital owned by the county or municipality or other governmental entity." In the present situation the county does own the hospital. Therefore, pursuant to the rationale expressed in the earlier opinions, a levy under R.C. 5705.191 for the support of general and tuberculosis hospitals would be a proper source of funds to cover the proposed payments.

It is a well settled principle that counties are creatures of the legislatures, and that county commissioners and other officers of the county have only those powers which the legislature has granted by statute, and those which are necessarily implied by such statutes. Where financial transactions are involved any doubt must be resolved against the power to make expenditures. State, ex rel. Locker v. Penning, 95 Ohio St. 97, 98 (1916); Board of County Commissioners v. Gates, 83 Ohio St. 19, 30 (1910); Jones, Auditor v. Commissioners of Lucas County, 57 Ohio St. 189, 213 (1897); Opinion No. 71-092, Opinions of the Attorney General for 1971; Opinion No. 66-158, Opinions of the Attorney General for 1966. Therefore, the county's authority to make these expenditures, either by grant or pursuant to

a contract for services, must be found in a specific statutory provision, or necessarily implied thereby.

My research reveals no language in the Code which specifically empowers the county commissioners to make a grant for the hiring of doctors to staff an emergency room, or to enter into a separate contract with the lessee of a county hospital for the provision of emergency services. By way of contrast I would refer you to R.C. 339.11, under which the board of county commissioners may contract for the care of indigent sick and disabled, and R.C. 339.38 which authorizes contracts for the care of residents suffering from tuberculosis.

In the present case, the hospital has been leased by the county commissioners to a private nonprofit corporation pursuant to R.C. 339.09. That section reads as follows:

When the county hospital has been fully completed and sufficiently equipped for occupancy, in lieu of sections 339.06 to 339.08, inclusive, of the Revised Code, the board of county commissioners of any county may, upon such terms as are agreed upon between the board and a constituted and empowered nonsectarian Ohio corporation, organized for charitable purposes and not for profit, a majority of whose members reside in the county, lease for use as a general hospital, the lands, the buildings, and equipment of any general hospital owned by said county. Such lease may be from year to year or may provide for a term of not more than thirty years and may provide that such board has the option to renew such lease at the expiration thereof for a further term of not more than thirty years upon such terms as are provided for in such lease. In the event that said nonprofit corporation fails to faithfully and efficiently administer, maintain, and operate such hospital as a public general hospital, admitting patients without regard to race, creed, or color, then after an opportunity is given to be heard upon written charges, said agreement shall terminate and the control and management of said hospital, together with all additions, improvements, and equipment, shall revert to and become the property of the county to be operated as provided by law.

That the primary objective of the lease should be the efficient operation of the hospital is evidenced by the directive in R.C. 339.09 that where the corporation fails to faithfully and efficiently administer, maintain, and operate the hospital, in the manner specified, the agreement shall be terminated and the control and management of the hospital shall revert to the county. Beyond this, and limits imposed on the duration of the agreement, the section simply states that the lease shall be 'upon such terms as are agreed upon.' It follows from this language that the county commissioners in entering into a lease

agreement with the private corporation for the operation of the hospital may provide for payments to the lessee corporation to cover costs which are reasonably related to the purpose of the lease. Therefore, where the county commissioners make a determination that such payments for emergency services would facilitate the efficient administration and operation of the hospital, they may provide in the lease for the expenditures pursuant to authority in R.C. 339.09.

Parties to a lease may, of course, agree to a modification of the terms of the agreement. The Bruner-Goodhue-Cooke-Cranz Agency Co. v. Smith, 25 Ohio App. 21 (1927); 49 Op. Jur. 27 (192), Landlord and Tenant, Sections 166-174. It follows that the county and the private corporation may modify or amend the lease agreement to provide for the payments in question just as they could have provided in the original lease. I must conclude, then, that the county commissioners may provide in the lease, or by modification of the lease, to pay to the nonprofit corporation, which has leased the hospital, the cost of providing emergency service, including the cost of hiring doctors to staff the emergency room. The payments may be made from the proceeds of a special levy submitted to the voters pursuant to R.C. 5705.191. Such expenditures would not, in my opinion, violate the provisions of Article VIII, Section 6, Ohio Constitution. While it is a well established rule that unrestricted payments of public money may not be made to private corporations, it has been held that public funds may be paid to a private corporation, not for profit, where the payment is for a public purpose. State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142 (1955); State ex rel. Leaverton v. Hearn, 109 Ohio St. 530 (1922); Opinion No. 71-044, Opinions of the Attorney General for 1971; Opinion No. 73-016, Opinions of the Attorney General for 1973.

It should be noted, however, that the county commissioners in making such payments pursuant to a covenant in the lease, are charged with exercising reasonable judgment to determine that the hospital is, and will continue to be operated efficiently, since where a determination of inefficiency is made R.C. 339.09 requires that the lease be terminated. Thus the county may not make such expenditures to bolster an inefficiently run hospital, but may exercise its discretion under R.C. 339.09 only to assist an efficient operation in providing better services in accordance with the intent of the legislature.

In specific answer to your question, it is my opinion and you are so advised that:

1. A board of county commissioners may not, by grant or by separate contract for emergency services, make payments from a special levy under R.C. 5705.191 to the lessee of a county general hospital to cover the costs of hiring additional doctors to staff the emergency room of the hospital.

2. The board of county commissioners may, however, pursuant to a provision in the lease agreement, entered under R.C. 339.09, make such payments from the proceeds of the levy submitted to the voters under R.C. 5705.191.