

**OPINION NO. 97-004****Syllabus:**

A member of a board of health of a general health district who is paid pursuant to R.C. 3709.02, as enacted in 1991-1992 Ohio Laws, Part I, 1741 (Am. S.B. 297, eff. April 16, 1993), is entitled to be paid, exclusive of mileage, an amount not to exceed eighty dollars per day for those necessary expenses that the member actually incurs in attending each meeting listed in that statute. (1994 Op. Att'y Gen. No. 94-023, approved and followed.)

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**To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio**  
**By: Betty D. Montgomery, Attorney General, January 8, 1997**

You have asked us to reconsider a question of statutory construction that was addressed in 1994 Op. Att'y Gen. No. 94-023. The statute in question is R.C. 3709.02, as enacted by the General Assembly in 1991-1992 Ohio Laws, Part I, 1741 (Am. S.B. 297, eff. April 16, 1993).

R.C. 3709.02 provides for the appointment and payment of members of a board of health of a general health district. In Am. S.B. 297 the General Assembly amended R.C. 3709.02 to read, in pertinent part, as follows:

Each member of the board may be paid a sum not to exceed eighty dollars a day and mileage to and from the place of meeting at the rate established by the director of budget and management pursuant to section 126.31 of the Revised Code to cover the actual and necessary expenses incurred during his attendance at any meeting of the board and not exceeding five meetings of board committees in any one year.<sup>1</sup> (Footnote added.)

In Op. No. 94-023 the Attorney General was asked whether the foregoing version of R.C. 3709.02 permitted a member of a board of health of a general health district to be paid an amount not exceeding eighty dollars a day while attending meetings of the board, regardless of whether the member actually incurred necessary expenses during his attendance. See Op. No. 94-023 at 2-105 (noting that the question was prompted by the practice of paying members of a board of health "eighty dollars per meeting, regardless of whether the figure constitutes reimbursement for

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<sup>1</sup> Prior to this amendment, R.C. 3709.02 had read, in pertinent part, as follows:

Each member of the board shall be paid twenty dollars a day and mileage at the rate of fifteen cents a mile to and from the place of meeting to cover the actual and necessary expenses incurred during his attendance at any meeting of the board and not exceeding five meetings of board committees in any one year.

the amount of expenses the member actually incurs in attending any such meeting"). In response the Attorney General advised that pursuant to R.C. 3709.02, a member of a board of health "is entitled to be paid an amount not to exceed eighty dollars per day for those necessary expenses that the member actually incurs in attending such meeting." Op. No. 94-023 (syllabus).

In arriving at this conclusion Op. No. 94-023 first described the subject and structure of R.C. 3709.02:

The payment to a board member under R.C. 3709.02 is for actual and necessary expenses incurred in attending any meeting of the board of health of the general health district and for up to five committee meetings per year. The amount of such payment has two components: an amount not to exceed eighty dollars per day for actual and necessary expenses, other than mileage, incurred in attending the meeting and a mileage reimbursement for travel to and from the meeting.

*Id.* at 2-104.

Op. No. 94-023 then considered R.C. 3709.02's use of the words "actual" and "necessary" to describe the expenses incurred by a board member and for which the board member could be paid as a result of the member's attendance at meetings of the board of health. The opinion consulted standard dictionary definitions of these terms to arrive at their meaning as used in R.C. 3709.02, and then explained the evident intent of the General Assembly as reflected in the plain language of the statute:

According to *Webster's New World Dictionary* 14 (2d college ed. 1978), the word "actual" means, in part, "existing in reality or in fact; not merely possible, but real; as it really is [the *actual* cost of the dam]." In addition, "necessary" expenses are those "that cannot be dispensed with; essential; indispensable ... inherent in the situation." *Id.* at 950. *See generally* 1993 Op. Att'y Gen. No. 93-066 (discussing "necessary and reasonable expenses"). Thus, by modifying the word "expenses" with the words "actual and necessary" as provided in R.C. 3709.02, the General Assembly has limited the expenses for which payment may be made in three specific respects. First, board members are to be reimbursed only for their actual expenses incurred in attending a meeting. Second, they are to be reimbursed only for such expenses as are necessary and reasonably incurred in attending a meeting. Third, in any event, the amount of this reimbursement in no circumstances is to exceed eighty dollars per day, exclusive of mileage costs.

*Id.* at 2-105.

You explain in your letter that the Auditor of State has issued findings for recovery against several members of a board of health of a general health district within your county who were paid in accordance with R.C. 3709.02 as enacted in Am. S.B. 297. The findings are for amounts paid to these board members that did not correspond to the amount of expenses actually and necessarily incurred by these individuals in attending board meetings. The Auditor of State issued his findings on the basis of the advice rendered in Op. No. 94-023.

Accordingly, you have asked us to review and reconsider the conclusion in Op. No. 94-023 regarding the interpretation and application of R.C. 3709.02 as enacted in Am. S.B. 297. You express the view in your letter that the Attorney General erred in his reading of this statute. Specifically, you state that it can be argued, and it is your opinion, "that the phrase 'to cover actual and necessary expenses' is a modifier of the clause beginning with the word 'mileage' and continuing 'to and from the place of meeting,' [and] not of the phrase 'eighty dollars a day.'" You further assert that "[t]his was the manner in which the prior code sections had been read to determine that members of the health boards were paid for attendance at the meeting with the mileage payment being considered expense reimbursement." Such a reading of the statute would mean that a member of a board of health of general health district who is paid pursuant to R.C. 3709.02, as enacted in Am. S.B. 297, is entitled to be paid a sum not exceeding eighty dollars a day during his attendance at board meetings and up to five committee meetings in any one year, regardless of whether the board member actually incurs necessary expenses in an amount that corresponds to the amount thus paid to him.

Your inquiry is addressed to a single sentence that served as the second paragraph of R.C. 3709.02. The issue you have described concerns, *inter alia*, the syntactical relationships created within the structure of that sentence. Therefore, let us first examine the language and punctuation of that sentence in order to address the reading of the statute you have suggested.

In its most fundamental terms, the second paragraph of R.C. 3709.02, as enacted in Am. S.B. 297, comprises a simple sentence containing one subject, a main verb clause followed by two complementary objects and their modifiers, and an infinitive clause comprising an infinitive and a single complementary object and its several modifiers. The subject of the sentence is "member," which is modified by the single adjective "[e]ach," and the phrase "of the board."

The main verb clause is "may be paid," consisting of the auxiliary verb "may be" and the past participle of "pay," which together form a construction in the present tense, passive voice, and subjunctive mood. The two complementary objects of this main verb clause are "sum," a noun, and "mileage," another noun. The first complement, "sum," is modified by the indefinite article "a," and the phrase "not to exceed eighty dollars a day." The second complement, "mileage," is modified by two prepositional phrases: "to and from the place of meeting," and "at the rate established by the director of budget and management pursuant to [R.C. 126.31]."

The final portion of this sentence is an infinitive clause. It consists of the present infinitive "to cover," and its complementary object, the plural noun "expenses," which is further modified by the adjectives "actual" and "necessary" and a participial clause commencing with the past participle "incurred." The participle "incurred" is further modified by a prepositional phrase commencing with the preposition "during."

You have suggested that the infinitive clause that concludes this sentence serves to modify only one of the two complementary objects of the sentence's main verb clause. Specifically, you assert that the clause commencing with the infinitive "to cover" modifies the noun "mileage," but not the noun "sum." You state that this is the manner in which the statute had been read and applied by boards of health prior to the issuance of Op. No. 94-023, and that recent amendments to R.C. 3709.02 enacted by the General Assembly in Am. Sub. H.B. 117, 121st Gen. A. (1995) (eff., in part, Sept. 29, 1995) confirm the validity of this interpretation.

We have given careful consideration to the position you have advocated in this matter, yet find that we are unable to adopt your proposed reading of R.C. 3709.02. There is nothing within the sentence structure just summarized to indicate that the clause commencing with the present infinitive "to cover" modifies only "mileage," and not the term "sum." Rather, the composition of this sentence reflects the opposite. Each of the nouns "mileage" and "sum" serves as a direct object of the main verb clause "may be paid." These two terms are joined together by the conjunction "and." This means that these two terms should be understood as comprising a single compositional unit, and it is this entire unit that is modified by the infinitive clause that concludes the sentence. Had it been the intent of the General Assembly that the concluding infinitive clause modify the term "mileage" only, it could have effected that result by setting that entire construction apart from the term "sum" by the insertion of a comma after the word "day" and another comma after the past participle "incurred."

Alternatively, the General Assembly could have undertaken a more extensive restructuring of the language and organization of R.C. 3709.02 had it wished to convey its understanding that a member of a board of health was entitled to be paid a sum not exceeding eighty dollars a day during his attendance at any meeting of the board without regard to the expenses actually and necessarily incurred by that member. You note that the General Assembly has effected such a revision in its recent enactment of Am. Sub. H.B. 117, 121st Gen. A. (1995) (eff., in part, Sept. 29, 1995). In Am. Sub. H.B. 117 the General Assembly has amended R.C. 3709.02 to read, in pertinent part, as follows:

(B) Each member of the board shall be paid a sum not to exceed eighty dollars a day for the member's attendance at each meeting of the board. No member shall receive compensation for attendance at more than eighteen meetings in any year.

(C) Each member of the board shall receive travel expenses at rates established by the director of budget and management pursuant to section 126.31 of the Revised Code to cover the actual and necessary travel expenses incurred for travel to and from meetings that take place outside the county in which the member resides, except that any member may receive travel expenses for registration for any conference that takes place inside the county in which the member resides.

Thus, matters that previously had been addressed in a single sentence of R.C. 3709.02 now comprise divisions (B) and (C) of that statute. As pertains to your inquiry, division (B) of R.C. 3709.02 provides that each member of a board of health of a general health district shall be paid a sum not to exceed eighty dollars a day for the member's attendance at each meeting of the board, and also provides that no member shall receive such payment for attendance at more than eighteen meetings in any year. Am. Sub. H.B. 117 has omitted from R.C. 3709.02 the requirement that a board member's receipt of such sum shall correspond to a specific amount of expenses actually and necessarily incurred by the member during his attendance at meetings of the board. In another departure from prior law, R.C. 3709.02(B) expressly designates as "compensation" the payments made to a board member for his attendance at each meeting of the board of health.

You have suggested that R.C. 3709.02, as enacted in Am. S.B. 297, should be read and interpreted in a manner that corresponds to the language of the amendments thus made in Am. Sub. H.B. 117. The presumption that appears to underlie your argument is that the interpretation accorded R.C. 3709.02 in Op. No. 94-023 mistakenly assessed the intent of the General Assembly

regarding payments to members of a board of health of a general health district, and that the General Assembly rectified that error with the amendments it enacted in Am. Sub. H.B. 117.

A variety of reasons, however, may have impelled the General Assembly to enact the amendments in Am. Sub. H.B. 117. For example, it is equally plausible that the General Assembly, upon fuller consideration of the matter, decided that the interpretation accorded R.C. 3709.02 in Op. No. 94-023 reflected the plain and unambiguous language of the statute as then written. It also is possible that Op. No. 94-023 correctly assessed the intent of the General Assembly and that the enactment of Am. Sub. H.B. 117 instead marks a rethinking on the part of the General Assembly regarding the method of compensating members of boards of health under R.C. 3709.02. *See generally, e.g., Robert V. Clapp Co. v. Fox*, 124 Ohio St. 331, 178 N.E. 586 (1931) (where the legislature uses different language in a statute, it is presumed that different meanings were intended); *Industrial Comm. of Ohio v. Snyder*, 113 Ohio St. 405, 415, 149 N.E. 397, 400 (1925) (where one or more sections of a statute are repealed and reenacted in a different form, "the presumption arises that the Legislature intended some change in the effect and operation of the law by a substantial change in the language of the statute").

What is relevant for the purpose of the present examination is the language that the General Assembly used when it amended R.C. 3709.02 in Am. S.B. 297. In our view that language is sufficiently plain and unambiguous that we need inquire no further regarding legislative intent.

It is, therefore, my opinion, and you are advised that a member of a board of health of a general health district who is paid pursuant to R.C. 3709.02, as enacted in 1991-1992 Ohio Laws, Part I, 1741 (Am. S.B. 297, eff. April 16, 1993), is entitled to be paid, exclusive of mileage, an amount not to exceed eighty dollars per day for those necessary expenses that the member actually incurs in attending each meeting listed in that statute. (1994 Op. Att'y Gen. No. 94-023, approved and followed.)