

OPINION NO. 75-014

Syllabus:

1. There is no authority under R.C. 309.09 for the prosecuting attorney of a participating county to provide general legal counsel to a joint county community mental health and retardation board. The board may, however, employ legal counsel pursuant to R.C. 340.04.

2. A joint county community mental health and retardation board may, pursuant to R.C. 340.03(E), enter into contracts for the lease of facilities. Contracts and expenditures made by a board pursuant to R.C. 340.03 need not be approved by the county commissioners of participating counties.

3. A joint county community mental health and retardation board may procure and pay the cost of group hospitalization insurance for its employees pursuant to R.C. 340.03 and R.C. 340.04, regardless of whether the boards of county commissioners of participating counties provide such fringe benefits to their employees.

To: Gene Wetherholt, Gallia County Pros. Atty., Gallipolis, Ohio
By: William J. Brown, Attorney General, March 13, 1975

Your request for my opinion poses a series of questions raised by the community mental health and mental retardation board which serves your county:

"1. Who is the legal adviser for a multi-county community mental health center, and if it is not the Prosecuting Attorney, who gives the authority for paying these legal fees or establishing the legal adviser?

"2. Does the 648 Board have the legal authority to enter into contracts for renting or leasing of facilities, specifically referring again to a multi-county board?

"3. When a multi-county 648 Board provides fringe benefits for its employees and the situation arises where some counties offer Blue Cross and Blue Shield as well as other fringe benefits for their employees, and other counties within the jurisdiction of the Board offer no fringe benefits, is it possible for the Board to legally authorize fringe benefits for its employees as a multi-county agency?"

In addition your letter sets out the following questions for my consideration:

"1. In the absence of statutory authority, would the Prosecuting Attorney of any of the participating counties of a multi-County Board, such as the one here in point, have the duty or the authority to serve as legal counsel for such a board.

"2. Which Board of County Commissioners of the participating Counties of a multi-county board, such as the one here in point, should be responsible for making the decisions regarding expenditures of the multi-county board for signing contracts involving such multi-county boards, and for authorizing payment of expenditures.

"3. Are employees of a multi-county board, such as the one here in point, 'County Employees' for the purposes of Section 305.171, Revised Code and other pertinent Sections regarding county employees. If so, in which county of the multi-county area are they deemed to be county Employees and which County Auditor is to make payment to or for such employees. We refer you to Opinions 68-140, 69-045 and 69-049"

These questions correspond generally to the first three questions and I will discuss them in the course of answering the questions posed by the board.

Community mental health and retardation service districts are provided for in R.C. Chapter 340. Pursuant to R.C. 340.01 such districts may be established by any county or combination of counties having a population of at least fifty thousand.

The first question raised by the board, as well as your first question, concerns the duty and the authority of the prosecuting attorney of a participating county to act as legal advisor to a joint-county community mental health and retardation board. A prosecuting attorney's role as legal advisor is defined by R.C. 309.09 which reads:

"The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.

"Such prosecuting attorney shall be the legal adviser for all township officers. When the board of township trustees deems it advisable or necessary to have additional legal counsel it may employ an attorney other than the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

In the situation you have outlined, the issue is whether a joint county community mental health and retardation board may be characterized as a county board so as to qualify under R.C. 309.09 for legal counsel.

In Opinion No. 2383, Opinions of the Attorney General for 1961, p. 366, my predecessor considered the meaning of "county board" as used in R.C. 309.09. He concluded that a regional planning commission was not a county board because such a commission "is a co-operative venture involving at least one municipal corporation and one county * * * (and) is not essentially a subdivision of the county or a subordinate department of the county."

See also Opinion No. 1523, Opinions of the Attorney General for 1964, and Opinion No. 95, Opinions of the Attorney General for 1963, which involved a joint vocational school district and a bi-county airport authority respectively. In both cases the multi-county nature of the boards was relied on by the Attorney General in determining that they were not county boards for purposes of R.C. 309.09. Similarly, a joint county community mental health and retardation district is neither a subdivision nor subordinate department of any of the counties that combined to establish it. Rather it is separate entity established by joint action of several counties which operates subject to the rules and regulations of the Director of the State Board of Mental Health and Mental Retardation. It follows that a community mental health and retardation board, which serves more than one county is not a county board of any of the participating counties and is not entitled to legal counsel from the prosecuting attorneys of such counties under R.C. 309.09.

On the contrary, such boards are authorized to retain their own legal counsel. R.C. 340.04(E) directs the executive directors to "[e]mploy and remove from office such employees and consultants as may be necessary for the work of the board, and fix their compensation within the limits set by the salary schedules and the budget approved by the board." By way of analogy see Opinion No. 2736, Opinions of the Attorney General for 1958, p. 567, in which my predecessor concluded that similar language in R.C. 713.21 empowered a regional planning commission to employ legal counsel.

I would note, however, that while a prosecuting attorney has no general authority under R.C. 309.09 to provide a community mental health and retardation board with legal counsel, he is directed by R.C. 309.12 to satisfy himself that funds of the county or public moneys in the hands of the county treasurer are not mishandled in violation of any law. Under R.C. 340.10 state funds allocated for the support of a joint county community mental health and retardation district are paid to the treasurer of the county designated in the program agreement as custodian of the community mental health and retardation fund. Therefore, the prosecuting attorney of the county having custody of the board's funds may inquire into the legality of the handling of any funds deposited with the county treasurer pursuant to R.C. 340.10.

With respect to the first question I must, therefore, conclude that, while a prosecuting attorney may pursuant to R.C. 309.12 inquire into the handling of funds in the custody of the county treasurer, there is no authority under R.C. 309.09 for a prosecuting attorney to provide general legal counsel to the board. The board may, however, employ legal counsel pursuant to R.C. 340.04.

The second question raised by the board is whether a joint county board has legal authority to enter into contracts for renting or leasing facilities. In addition you have asked which board of county commissioners of the participating counties of a joint county board should be responsible for decisions regarding expenditures of the joint county board and for signing contracts involving such boards.

It must first be noted that while participating counties by their action combine to establish a community mental health and retardation board, the powers and duties of such boards are set out by statute. R.C. 340.03 gives the board broad authority to determine policy and to take necessary action to effect that policy. That section reads in pertinent part as follows:

"Subject to rules and regulations of the director of mental health and mental retardation, the community mental health and retardation board, with respect to its area of jurisdiction, and except for training center and workshop programs and facilities conducted pursuant to Chapter 5127. of the Revised Code, shall:

(A) Review and evaluate community mental health and retardation services and facilities and submit to the director of mental health and mental retardation, the board or boards of county commissioners, and the executive director of the program, recommendations for reimbursement from state funds as authorized by section 5119.62 of the Revised Code and for the provision of needed additional services and facilities with special reference to the state comprehensive mental health plan;

(B) Coordinate the planning for community mental health and retardation facilities, services, and programs seeking state reimbursement;

(C) Receive, compile, and transmit to the department of mental health and mental retardation applications for state reimbursement;

(D) Promote, arrange, and implement working agreements with social agencies, both public and private, and with educational and judicial agencies;

(E) Enter into contracts with state hospitals, other public agencies, and with private or voluntary hospitals and other private or voluntary nonprofit agencies for the provision of mental health and mental retardation service and facilities;

* * * * *

(G) Prescribe the duties of the executive director and review his performance thereof;

(H) Approve salary schedules for employees and consultants in agencies and facilities maintained and operated, in whole or in part, or by contract, under the direction of the board;

(I) Recruit and promote local financial support for mental health and retardation programs from private and public sources;

(J) In the event a needed service cannot be provided by an existing public or private agency, directly operate a mental health or mental retardation facility until such time as this responsibility can be assumed by another agency.

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(L) Establish the operating procedures of the board and submit an annual report of the programs under the jurisdiction of the board, including a fiscal accounting, to the board of county commissioners.

(M) Establish such rules and regulations or standards and perform such other duties as may be necessary or proper to carry out Chapter 340. of the Revised Code.

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A board, therefore, has specifically defined authority under R.C. 340.03(E) to enter into contracts with certain agencies for mental health and mental retardation service and facilities. It should be noted that there is no qualification of this authority to preclude contracts for the lease of facilities. Rather the statute uses the broad language "for the provision of * * * facilities." It necessarily follows that the power to contract for the provision of facilities includes a contract to lease such facilities.

Nor does it appear that under such contracts the provision of facilities as a mere incident of what is essentially a contract for services. Such a construction would deny a board of the power to contract for facilities alone, a course of action clearly implied in R.C. 340.03(J). This view is bolstered by reference to Am. H.B. No. 421, effective May 7, 1974, which gave a joint county board authority to levy taxes for the purpose of paying current operating expenses and for acquiring and constructing permanent improvements. See R.C. 5705.01 *et seq.* I must, therefore, conclude that a joint county board has authority under R.C. 340.03 (E) to lease in its own name facilities necessary to the operation of the district. The conclusion might be different in the case of a single county board. See Opinion No. 71-070, Opinions of the Attorney General for 1971.

Furthermore, I find nothing in R.C. 340.03 or elsewhere in R.C. Chapter 340. which would require the board of county commissioners of any of the participating counties to sign every contract and approve all the expenditures of a joint county community mental health and retardation board. While a board of county commissioners may pursuant to R.C. 340.07 appropriate funds for the acquisition, construction, reconstruction, maintenance or

operation of mental health and mental retardation facilities and programs, such involvement is not mandatory but rather is a matter within the discretion of each board of county commissioners. In addition such expenditures must be distinguished from those made by the community mental health and retardation board pursuant to authority of R.C. 340.03. Expenditures made by a joint county board are payable from the community mental health and retardation fund in the designated county treasury pursuant to vouchers approved by the community mental health and retardation board. Opinion No. 69-015, Opinions of the Attorney General for 1969. Therefore, while the designated county treasury of one of the participating counties is, under R.C. 340.03 and R.C. 340.10, the proper depository of moneys available for the use of a joint county community mental health and retardation board and the county auditor of that county is designated as the auditor and fiscal officer of the joint county district, neither the county commissioners of that county nor the commissioners of any of the other participating counties is required to approve expenditures or to sign contracts made by a joint county board pursuant to R.C. 340.03.

The final questions concern the nature of employment with a joint county community mental health and retardation board. Specifically you have asked whether employees of a joint county board are "county employees" for the purposes of R.C. 305.171 and other sections regarding county employees. And the joint county board in your area has asked whether such a board may legally authorize fringe benefits such as paying the cost of group insurance coverage for its employees, even though some of the participating counties do not offer such fringe benefits to their employees.

Authority for a community mental health and retardation board to hire employees and determine the extent of their compensation is provided by R.C. 340.03(H), which directs the board to approve salary schedules for employees and consultants in agencies and facilities under the direction of the board, and R.C. 340.04 which prescribes the duties of the board's executive director as follows:

"In addition to such other duties as may be lawfully imposed, the executive director of a community mental health and retardation board shall:

* * * * *

"(E) Employ and remove from office such employees and consultants as may be necessary for the work of the board, and fix their compensation within the limits set by the salary schedule and the budget approved by the board;

"* * * * *"

While it was held in Opinion No. 69-045 and Opinion No. 69-049, Opinions of the Attorney General for 1969, that a single county board's employees are county employees for the purpose of R.C. 305.171, which authorizes group insurance plans, those Opinions must be distinguished from the present situation.

The questions you have posed concern a joint county board,

which, as I have noted above, is neither a subdivision nor a subordinate department of any of the counties that combined to establish it. Therefore, under the rationale applied in Opinion No. 2383, supra, Opinion No. 1523, supra, and Opinion No. 95, supra, the board in question is not a county board and its employees are not county employees for purposes of R.C. 305.171 and other sections relating to county employees.

With respect to a joint county community mental health and retardation board's authority to provide fringe benefits, such as group insurance coverage, for its employees, it may initially be noted that the term "compensation" has been given a variety of definitions ranging from one synonymous with "salary" to a broader interpretation which would include "fringe benefits." See my discussion of this in Opinion No. 72-059, Opinions of the Attorney General for 1972. In that Opinion I defined the term broadly to include the payment of hospitalization insurance premiums.

This construction relied on a series of opinions which have held that authority granted to "fix compensation" includes the power to pay the cost of hospitalization insurance for employees. Opinion No. 2171, Opinions of the Attorney General for 1961, p. 218; Opinion No. 4685, Opinions of the Attorney General for 1941, p. 1091; Opinion No. 3382, Opinions of the Attorney General for 1931, p. 3382; Opinion No. 2055, Opinions of the Attorney General for 1928, p. 1099.

I must, therefore, conclude that a joint county community mental health and retardation board may procure and pay for group hospitalization for its employees regardless of whether the boards of county commissioners of participating counties provide such fringe benefits to their employees.

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

1. There is no authority under R.C. 309.09 for the prosecuting attorney of a participating county to provide general legal counsel to a joint county community mental health and retardation board. The board may, however, employ legal counsel pursuant to R.C. 340.04.

2. A joint county community mental health and retardation board may, pursuant to R.C. 340.03(E), enter into contracts for the lease of facilities. Contracts and expenditures made by a board pursuant to R.C. 340.03 need not be approved by the county commissioners of participating counties.

3. A joint county community mental health and retardation board may procure and pay the cost of group hospitalization insurance for its employees pursuant to R.C. 340.03 and R.C. 340.04, regardless of whether the board of county commissioners of participating counties provide such fringe benefits to their employees.