

OPINION NO. 85-005**Syllabus:**

A board of county hospital trustees may not make payments to those hospital employees whose services are no longer needed where the sole purpose of such payments is to encourage the employees' early retirement, unless the board reasonably finds that such action is necessary to the efficient operation of the hospital.

To: Richard B. Meyers, Lawrence County Prosecuting Attorney, Ironton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 13, 1985

I have before me your request for my opinion concerning the authority of a county hospital to encourage the early retirement of employees who are no longer

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needed at the hospital by offering such employees income supplements or bonuses. If the county hospital may adopt such a practice, you ask what form of payments would be acceptable. It is my understanding that your concern is whether the board may expend money for the purpose of encouraging certain employees to terminate their employment; you do not question the effect, if any, of such a plan upon the employees' eligibility for benefits under the Public Employees Retirement System, R.C. Chapter 145. See footnote 3, *infra*. Thus, the scope of this opinion is accordingly limited. Although you have requested an informal response, I have elected to respond by means of this formal opinion due to the general applicability of this discussion to county hospitals throughout the state.

A board of county hospital trustees is established pursuant to R.C. 339.02. As a creature of statute, a board of county hospital trustees has only those powers expressly granted by statute or necessarily implied therefrom. See Burger Brewing Co. v. Thomas, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975); State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947); State ex rel. The A. Bentley & Sons Co. v. Pierce, 96 Ohio St. 44, 117 N.E. 6 (1917). Since a county hospital is a public agency, see 1973 Op. Att'y Gen. No. 73-017, the board of county hospital trustees is bound by the principle that it may spend public funds only pursuant to clear statutory authority. See State ex rel. Locher v. Menning, 95 Ohio St. 97, 115 N.E. 571 (1916). Further, the board may expend public money only for a valid public purpose. See Kohler v. Powell, 115 Ohio St. 418, 154 N.E. 340 (1926). It is, therefore, necessary to examine the statutory powers of the board of county hospital trustees in order to determine whether such board has the requisite authority to make the type of payments about which you ask.

Pursuant to R.C. 339.06, the board of county hospital trustees has broad authority with respect to the hiring and compensation of county hospital employees. See R.C. 339.03; R.C. 339.16. Specifically, the board of county hospital trustees has authority to "grant to its employees any fringe benefits the board determines to be customary and usual in the nonprofit hospital field in its community. . . ." R.C. 339.06. In discussing the provisions of former R.C. 305.171, concerning the procurement of insurance for county employees by the board of county commissioners, the court in Madden v. Bower, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969), considered the nature of "fringe benefits," stating:

The purpose of an employer, whether public or private, in extending "fringe benefits" to an employee is to induce that employee to continue his current employment. If inducement to continue public service could not be found in the provisions of former Revised Code Section 305.171, the public purpose of payments thereunder would be highly suspect, if not flatly unconstitutional.

20 Ohio St. 2d at 137-138, 254 N.E.2d at 359. Accordingly, a fringe benefit is generally understood to be a form of employee compensation the purpose of which is to encourage the employee to continue his current employment. See 1982 Op. Att'y Gen. No. 82-006 at 2-16 through 2-17 ("a fringe benefit is commonly understood to mean something that is provided at the expense of the employer and is intended to directly benefit the employee so as to induce him to continue his current employment").

In 1981 Op. Att'y Gen. No. 81-052, my predecessor considered whether a board of education could make cash payments in addition to regular salary payments to teaching employees who were early retirees.¹ The opinion concluded at 2-203:

Since early retirement bonuses are not the subject of R.C. 3317.13-.14 or any other statute governing boards of education and their teaching

¹ 1981 Op. Att'y Gen. No. 81-052 was issued prior to the enactment of R.C. 3307.35 which expressly authorizes an employer to establish a retirement incentive plan for its employees who are members of the State Teachers Retirement System and did not discuss the effect, if any, of the adoption of such a program upon a participant's eligibility for retirement benefits under the State Teachers Retirement System, R.C. Chapter 3307.

employees, such benefits are authorized by the general authority of a board of education to compensate, provided that each teaching employee receives the minimum salary required by R.C. 3317.13, apart from the receipt of cash payments pursuant to a retirement incentive program.

Although the provision of cash payments as part of a retirement incentive program may encourage certain employees to continue their current employment in order to be able to take advantage of such program at some time in the future, and, may thus qualify as a form of compensation, the payments about which you ask are not being made for the purpose of encouraging employees to remain in their present employment. Rather, such payments are intended to encourage the termination of service of those employees who are no longer needed at the hospital. I must conclude, therefore, that the power of a board of county hospital trustees to provide fringe benefits for county hospital employees does not include the power to make payments to encourage the early retirement of those hospital employees whose services are no longer needed.

Although the board may not make the payments about which you ask as a form of employee compensation, it is possible that other statutory authority may exist allowing for such payments. In 1977 Op. Att'y Gen. No. 77-090, my predecessor was asked whether a state department or agency could provide its employees with free parking facilities on state owned property. The opinion concluded that since the compensation of state employees was governed by statute, "a state agency does not have the authority to provide parking to state employees free of charge as a fringe benefit." Op. No. 77-090 at 2-304. The opinion recognized, however, that there may be situations where the provision of free parking would not constitute a fringe benefit. Op. No. 77-090 states at 2-305:

If the primary purpose in providing the facility is the convenience of the state agency rather than an intention to directly benefit its employees, the provision of free parking would not constitute a fringe benefit. A state agency may for example, locate its office or facility in an area where no reasonable alternatives for parking are available. In such cases, parking facilities may be considered a necessary cost of doing business in such a location and the cost may, but need not be, passed on to the employee. The distinguishing characteristic in this situation is that the parking facility is necessary to the efficient operation of the state office and is not merely an added convenience to the employee.

A second situation in which the provision of free parking may be appropriate is where acquisition of a parking facility does not entail an additional direct monetary cost to the state. Included within this exception would be the situation where parking is incidental to the total site and cost of acquisition and a separate fee schedule cannot

² In 1966 Op. Att'y Gen. No. 66-157, one of my predecessors concluded that R.C. 339.06, as then in effect, 1959 Ohio Laws 737 (H.B. 440, eff. Nov. 4, 1959), authorizing the board to fix the compensation of county hospital employees, did not include the power to provide an extended service benefit as a fringe benefit for hospital employees, since such benefit was not specifically provided for by statute. Similarly, 1962 Op. Att'y Gen. No. 3139, p. 542, concluded that the power of a board of county hospital trustees to fix hospital employees' compensation did not include the power to grant employees discounts on hospital charges when such employees were patients of the hospital. Since issuance of these opinions, however, the Ohio Supreme Court has determined that the power to fix the compensation of public employees includes the authority to prescribe fringe benefits for such employees, subject to any constricting statutory authority. See Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). Because of the court's pronouncement in Ebert, it appears that Op. No. 66-157 and 1962 Op. No. 3139 are no longer valid.

be realistically ascertained. Also included herein would be the situation where the parking spaces and employees involved are so few that the amount of revenue generated would be disproportionate to the cost of collecting and managing the funds.

In conclusion, a state agency may not provide free parking to state employees as a fringe benefit. A state agency may, however, allow state employees to park free of charge on state property when it is necessary to the efficient operation of the state agency or when the acquisition and operation of the facility does not involve an additional direct monetary cost to the state. (Emphasis added.)

I note that, pursuant to statute, a board of county hospital trustees has broad authority to operate and manage the county hospital. R.C. 339.06 states, in pertinent part:

The board of county hospital trustees shall, upon completion of construction or leasing and equipping of the county hospital, assume and continue the operation of such hospital. The board shall have the entire management and control of the hospital, and shall establish such rules for its government and the admission of persons as are expedient.

The board has control of the property of the hospital. . .and has control of all funds used in the hospital's operation.

Many Attorney General opinions have considered the breadth of authority which the above-quoted language of R.C. 339.06 confers upon a board of county hospital trustees. See, e.g., 1972 Op. Att'y Gen. No. 72-084 (board may contract for services of certified public accountants or financial specialists to review and supervise hospital's financial operations); 1956 Op. Att'y Gen. No. 7307, p. 757 (board may purchase services of credit bureau where board deems services necessary to efficient operation of hospital's fiscal affairs). 1952 Op. Att'y Gen. No. 126, p. 97 at 103, discussed the discretionary powers conferred upon a board of county hospital trustees, as follows:

I am not unmindful of the general rule which limits the powers of public officers and boards created by statute quite strictly to the powers set forth in the statutes relative thereto and to those powers that are necessarily implied therefrom, but I also recognize the principle that where powers are conferred upon a board to operate and manage an institution intended for the public welfare, a large amount of discretion must be vested in such trustees, and that the statute can not undertake to enumerate in detail every movement that they may make. In this case the statute not only gives the board of trustees "the entire management and control of the hospital," but gives it also the power to "establish such rules for the government thereof as it deems expedient."

As stated in R.C. 339.06, employees of county hospitals are in the unclassified service, pursuant to R.C. 124.11, and such employees "may be suspended or removed. . .at any time when the welfare of such institution warrants suspension or removal." In light of this provision, it is not immediately apparent that early retirement incentive payments to those employees whose services are no longer needed at the hospital would further the efficient operation of the hospital, although it is possible that the board could determine that simply removing unneeded employees with substantial seniority might present such morale problems for younger employees looking to careers in the hospital that this option would disserve proper administration of the hospital. In any event, although a board of county hospital trustees has broad authority to operate and manage the county hospital, the board may not make payments to those employees whose services are no longer needed for the purpose of encouraging such employees' early retirement,

unless the board reasonably finds such payments are necessary to the efficient operation of the hospital. See 1983 Op. Att'y Gen. No. 83-029 (if Director of Transportation reasonably finds it necessary for efficient operation of his department, he may reimburse Department employees for personal property loss occurring in the course of their employment); Op. No. 77-090. Of course, the final determination as to whether such payments promote the efficient operation of the hospital must be made by the board of county hospital trustees.

Based on the foregoing, it is my opinion, and you are advised, that a board of county hospital trustees may not make payments to those hospital employees whose services are no longer needed where the sole purpose of such payments is to encourage the employees' early retirement, unless the board reasonably finds that such action is necessary to the efficient operation of the hospital.

³ Your letter mentions that the county hospital employees are members of the Public Employees Retirement System (PERS). Eligibility for retirement benefits under PERS is based, in part, upon the attainment of age and service credit requirements. See, e.g., R.C. 145.32 (age and service retirement); R.C. 145.35 (disability retirement). Further, pursuant to R.C. 145.47, a member's PERS contribution is based upon his "earnable salary or compensation," which is defined in R.C. 145.01(R) as:

salary or wages receivable during a payroll period for personal services plus such allowances for maintenance as are certified by the heads of departments. Fees and commissions, except those provided under [R.C. 507.09], paid to employees for special services, over and above regular salary payments or fees and commissions paid as sole compensation for services, shall not be used in computing "final average salary." Any additional terminal compensation paid in excess of the regular compensation shall not be subjected to deductions under [R.C. 145.47], nor used in computing "final average salary."

See generally R.C. 145.01(K) (defining "final average salary," a factor upon which benefits are calculated).

Pursuant to R.C. 3307.35, an employer is expressly authorized to establish a retirement incentive plan for its employees who are members of the State Teachers Retirement System. A plan adopted under R.C. 3307.35 "shall provide for purchase by the employer of service credit for eligible employees who choose to participate in the plan and for payment by the employer of the entire cost of such service credit." R.C. 3307.35. There is no similar statutory provision which allows employers of persons who are members of PERS to purchase service credit for PERS purposes as part of a retirement incentive plan of the type you propose.

In light of the foregoing, in the event that the board reasonably finds that payments to encourage employees to retire are necessary to the efficient operation of the hospital, such payments are not subject to PERS contributions and do not affect the minimum requirements for age and service retirement for such employees pursuant to R.C. Chapter 145.