

OPINION NO. 95-027**Syllabus:**

1. A county children services board has no authority under its power to compensate and fix fringe benefits pursuant to R.C. 5153.12 to take action, after its executive director has resigned from employment with the board, to provide that former executive director with payments for severance pay, vacation, or health insurance premiums if the executive director was not entitled to such payments under a statute or policy in existence prior to the resignation.
2. A county children services board has no authority to take action, after its executive director has resigned from employment with the board, to provide that former executive director with payments for severance pay, vacation, or health insurance premiums to which the executive director was not entitled under a statute or policy in existence prior to the resignation, unless the board reasonably finds that the provision of such payments is necessary to the efficient performance of the board's statutory functions.

To: Lynn Alan Grimshaw, Scioto County Prosecuting Attorney, Portsmouth, Ohio
By: Betty D. Montgomery, Attorney General, September 25, 1995

You have requested an opinion regarding the authority of a county children services board to make payments for severance pay, accrued vacation, and health insurance premiums to its former executive director after the executive director has resigned at the request of the board. You have described the pertinent situation as follows:

On June 14, 1994, the Scioto County Children Services Board requested the Executive Director's resignation. The Executive Director verbally tendered her resignation and the Board accepted. Later that day, the Executive Director submitted her resignation in writing and specified that it was "effective immediately." The Executive Director had worked for the Board for less than one year.

On June 16, 1994, the Board voted to pay the Executive Director 90 days severance pay, health insurance premiums for a period of 90 days, and accrued vacation. The Executive Director contends that she had been promised these payments as an inducement to resign. The Board agrees that there was discussion of severance pay and vacation benefits at the June 14th meeting, but denies that these payments were offered as an inducement to resign. Instead, the Board

contends that [the] Executive Director was simply given the option of resigning or being fired.

You have asked that, for purposes of this opinion, I assume that the facts are as described by the board -- that is, that the board discussed the payments in question on June 14th but did not vote on them until its June 16th meeting. Your question is whether the board can lawfully pay any of the benefits, since the vote to pay them did not occur until after the effective date of the resignation.

General Powers of a County Children Services Board

A county children services board is an agency of the county, created pursuant to R.C. Chapter 5153 for the purpose of carrying out various responsibilities with respect to children who are in need of public care or protective services. *See, e.g.*, R.C. 5153.07-.08, .15-.19. As a creature of statute, a county children services board has only those powers that it is expressly or impliedly granted by statute. *See, e.g.*, *Dreger v. Public Employees Retirement System*, 34 Ohio St. 3d 17, 20-21, 516 N.E.2d 214, 217 (1987); *Bell v. Board of Trustees*, 34 Ohio St. 2d 70, 75, 296 N.E.2d 276, 279 (1973) ("[w]hen the General Assembly enacts a law to accomplish some purpose it either gives express power to carry out that purpose, or the power is implied from the practical necessity of the situation"); 1985 Op. Att'y Gen. No. 85-005.

A county children services board is also bound by the general principle that public money may be expended only pursuant to clear statutory authority and any doubt as to the lawfulness of an expenditure must be resolved against the expenditure. *See, e.g.*, *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916). In addition, public money may be expended only to serve a public purpose. *See, e.g.*, *Kohler v. Powell*, 115 Ohio St. 418, 154 N.E. 340 (1926); 1982 Op. Att'y Gen. No. 82-006. Accordingly, a county children services board may make the expenditures in question only if the board has clear statutory authority, either express or implied, and if the expenditures serve a public purpose.

Authority of a County Children Services Board to Employ an Executive Director and Fix the Director's Compensation, Including Fringe Benefits

R.C. 5153.10 provides that the county children services board "shall designate an executive officer known as the 'executive director,' who shall not be in the classified civil service." R.C. 5153.11 grants the executive director authority, with the approval of the board, to appoint other employees, who are in the classified civil service. *See* R.C. 5153.11-.12. The board has express authority to "establish compensation rates and vacation benefits for any of its employees." R.C. 5153.12.¹

It has been established under Ohio law that a public entity with power to appoint employees also has the power to fix their compensation, including fringe benefits, subject to statutory provisions restricting particular types of benefits. *See, e.g.*, *Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980); 1981 Op. Att'y Gen.

¹ The compensation of public employees is subject to collective bargaining pursuant to R.C. Chapter 4117. You have not mentioned any collective bargaining agreement and it is assumed that no relevant collective bargaining agreement exists. *See* R.C. 4117.01(C) (defining "[p]ublic employee"). *See generally, e.g.*, 1989 Op. Att'y Gen. No. 89-012.

No. 81-052. R.C. 5153.12 grants a county children services board express authority to establish vacation benefits, which may vary from those granted to county employees generally pursuant to R.C. 325.19(A). See R.C. 325.19(G); 1992 Op. Att'y Gen. No. 92-066; see also R.C. 9.44. A county children services board's general authority to fix the compensation of its employees permits it to grant other sorts of fringe benefits, subject to statutes that constrict its power with respect to particular benefits.² See, e.g., 1980 Op. Att'y Gen. No. 80-061 (a county children services board has authority to grant overtime pay or compensatory time off to employees who are exempt from the overtime provisions of R.C. 4111.03).

Fringe Benefits

It is important to note, however, that the authority of a public entity to grant fringe benefits pursuant to its power to employ extends only to types of benefits that induce an employee to accept employment or continue employment with the public entity. If a benefit does not serve such a purpose, it cannot be considered a fringe benefit and does not come within the public entity's authority to employ and set compensation. See, e.g., Op. No. 85-005.

The general nature of fringe benefits was discussed by the Ohio Supreme Court in *Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E. 2d 357 (1969), as follows:

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 [authorizing a board of county commissioners to procure health insurance for county officers and employees and their immediate dependents], the public purpose of payments thereunder would be highly suspect, if not flatly unconstitutional.

20 Ohio St. 2d at 137-38, 254 N.E. 2d at 359. This concept of fringe benefits has been adopted in various opinions of the Attorney General. For example, Op. No. 82-006 states that "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." Op. No. 82-066 at 2-16 to 2-17; accord, e.g., 1990 Op. Att'y Gen. No. 90-075; Op. No. 85-005; 1977 Op. Att'y Gen. No. 77-090.

² It has been determined that the authority to compensate employees may include the authority to grant retroactive pay increases. See 1981 Op. Att'y Gen. No. 81-011 (syllabus, paragraph 3) ("[b]oards of education, boards of county commissioners and boards of township trustees possess the authority to grant retroactive pay increases to their employees"); see also, e.g., 1986 Op. Att'y Gen. No. 86-027. Ohio Const. art II, §29 prohibits the payment of "extra compensation" to any officer, public agent, or contractor after a service has been rendered or a contract has been entered into, except with the allowance of two-thirds of the members elected to each branch of the General Assembly. That provision does not apply to political subdivisions, however, and is not applicable to a county children services board. See Op. No. 86-027; Op. No. 81-011. Hence, the mere fact that compensation is granted for services previously rendered does not make the payment of that compensation unlawful.

Several Attorney General opinions have considered whether benefits that induce an employee to terminate employment may be considered fringe benefits and granted pursuant to the power to compensate. Those opinions conclude, in general, that such benefits may be considered fringe benefits if they are offered as part of a retirement program that may induce employees to retain their employment in order to take advantage of the program at some time in the future, but they cannot be considered fringe benefits if they serve no purpose other than encouraging some individuals to terminate their employment.³ *See, e.g.*, Op. No. 90-075 at 2-322 (assuming that a cash payment retirement incentive program "may be appropriately characterized as a form of compensation, and that such payments are not merely a device to encourage current employees to terminate their present employment"); Op. No. 85-005 at 2-13 ("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"); 1952 Op. Att'y Gen. No. 1713, p. 559 (syllabus, paragraph 1) (a city board of education is not authorized to pay public funds to a superintendent to secure the superintendent's consent to a contract rescission).

Payments at Issue Are Not Fringe Benefits

In the instant case, it does not appear that benefits proposed to be granted to the executive director of a county children services board after the director has resigned from that position can be considered "fringe benefits," as that term is commonly used. The benefits in question cannot serve the purpose of inducing the individual to continue employment with the board since the individual has already resigned at the request of the board. *See, e.g.*, 1986 Op. Att'y Gen. No. 86-027 at 2-144 ("where the employee is deceased when the board approves such policy [authorizing cash payments for unused sick leave upon the death of an employee], the payment thereunder to the estate of the deceased employee does not function as a fringe benefit. Under these circumstances, it is impossible for the benefit to provide an inducement to continued employment").

On the facts that you have presented, it is difficult to imagine that the payments in question serve any purpose other than that of providing additional benefits to an individual whose employment was terminated at the request of the board. *See, e.g.*, Op. No. 86-027 at 2-145 ("the payment of sick leave to the estate of an employee who died prior to the implementation of the policy serves no apparent public purpose, and clearly does not constitute compensation for purposes of R.C. 329.02"); Op. No. 82-006. It may be that the employment relationship did not last as long as the parties had hoped it would. Such a result, while unfortunate, does not expand the board's power to provide compensation. Instead, the board's power to

³ There is express statutory authority for certain employers or employing units to establish retirement incentive plans for their employees. *See* R.C. 145.297; R.C. 3307.35. Under such plans, the employer or employing unit purchases service credit for eligible employees who elect to participate in the plan and pays the entire cost of that service credit. The plan must remain in effect for at least one year. It is available to employees who are or will be eligible to retire before the date of termination of the plan. R.C. 145.297; R.C. 3307.35. The board of county commissioners may determine whether to offer such a plan to employees of a county children services board. R.C. 145.297; *see also* 1988 Op. Att'y Gen. No. 88-085. Your facts, however, do not describe any such statutory plan. The existence of statutes authorizing retirement incentive plans does not prevent an employer from establishing a retirement incentive program as a form of compensation, in appropriate circumstances. *See* 1990 Op. Att'y Gen. No. 90-075.

compensate extends only to salary and fringe benefits that come within the existing statutory scheme. An effort to grant benefits to a particular individual, after that person's resignation, on a one-time basis and not as part of any continuing policy, cannot reasonably be found to constitute a fringe benefit that induces anyone to retain employment with the public entity. Accordingly, the benefits in question cannot be granted to the former executive director as fringe benefits. As discussed more fully below, this conclusion applies to each of the benefits about which you have inquired.

Vacation Benefits

R.C. 325.19 provides county employees with a minimum vacation entitlement. R.C. 325.19(A) specifies that a county employee is not entitled to any vacation until the employee has completed the first year of employment, and it designates the amounts of vacation accrued with varying amounts of service. *See* 1994 Op. Att'y Gen. No. 94-008; 1989 Op. Att'y Gen. No. 89-012. R.C. 9.44 prescribes which service with other public entities must be included as prior service for the purpose of calculating vacation benefits. R.C. 5153.12 permits a county children services board to establish vacation benefits for any of its employees, and R.C. 325.19(G) exempts employees that are covered by such benefits from the vacation entitlement provisions of R.C. 325.19(A). *See* R.C. 325.19(G); R.C. 5153.12. It is clear that, under R.C. 5153.12, a county children services board may grant an employee vacation sooner than provided in R.C. 325.19(A) or in greater amounts than provided in R.C. 325.19(A) and R.C. 9.44. *See, e.g.,* R.C. 325.19(G); R.C. 5153.12; Op. No. 92-066. R.C. 325.19(C) governs payment for earned but unused vacation time, and prior Attorney General opinions have found that this provision restricts the power of an appointing authority with respect to payment for unused vacation leave. *See* 1991 Op. Att'y Gen. No. 91-050; Op. No. 89-012 (R.C. 325.19(C) constricts a county appointing authority's power over the use and accrual of employees' vacation benefits); 1987 Op. Att'y Gen. No. 87-063 at 2-388 ("R.C. 325.19 limits ... the instances in which an employee may receive payment for ... unused [vacation] leave").

Your question does not relate to payment for earned but unused vacation leave. Instead, it relates to payment for vacation leave that has not yet been earned. Although your letter uses the term "accrued vacation," the executive director had not in fact earned any vacation that she was permitted to take, or for which she was entitled to be paid, under any statute or policy that was in existence prior to her resignation. Under R.C. 325.19(A), no vacation leave is earned and due until the employee has attained the first year of employment. *See, e.g.,* Op. No. 94-008 at 2-31 ("a full-time county employee does not have any vacation leave placed to his credit until he has completed one year of 'service' and has 'attain[ed] ... the first year of employment'"). The county children services board in question had not, prior to June 16, 1994, established any vacation benefits pursuant to R.C. 5153.12 that granted the executive director vacation before the attainment of the first year of employment. The executive director had no prior employment with any public entity in Ohio and had been employed by the county children services board for less than one year. Thus, the executive director had established no legal entitlement to vacation benefits pursuant to R.C. 325.19 or any applicable policy. *See* R.C. 325.19; R.C. 5153.12; Op. No. 92-066.

Presumably the executive director is seeking payment for the portion of the first year's vacation that is proportional to the period of a year for which the executive director was employed. Under the applicable statutory provisions, however, the executive director is not entitled to any of that vacation until the conclusion of a full year of employment. While a policy

that permitted the vacation time to be earned at an earlier date would be permissible under R.C. 325.19(G) and R.C. 5153.12, no such policy had been adopted by the board prior to the executive director's resignation. To pay an individual, after termination, for vacation time that the individual would not be entitled to take if still employed provides no inducement to continue one's employment. A payment of that nature is not authorized by the board's authority to employ and fix compensation in accordance with R.C. 325.19(G) and R.C. 5153.12.

Payment of Health Insurance Premiums

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. The county children services board, as the appointing authority of its employees, may provide them with health insurance benefits in excess of those granted by the county. *See, e.g.*, Op. No. 92-066; Op. No. 80-061. *See generally* 1981 Op. Att'y Gen. No. 81-082; 1980 Op. Att'y Gen. No. 80-030. Thus, the payment of health insurance premiums for an employee is a fringe benefit that is authorized by statute.

It might be argued that a county children services board is not permitted to pay health insurance premiums for a former employee since the authority granted by R.C. 305.171 extends only to the purchase of insurance for county officers and employees and their immediate dependents. *See, e.g.*, Op. No. 86-027. This argument might be countered by the adoption of an arrangement for purchasing the insurance during a period of employment to cover a subsequent period. Even if it were concluded that the latter arrangement constitutes a permissible fringe benefit in some circumstances, however, the conclusion would not extend to the situation with which you are concerned. In your situation, no statute or policy in existence prior to June 16, 1994, provided for the payment of health insurance premiums following the termination of the employment of an executive director or other employee. The proposed payment of health insurance premiums could not serve the purpose of inducing continued employment since it was granted after the executive director's employment ended. Therefore, the county children services board has no authority to make the proposed payment of health insurance premiums as a fringe benefit.

Severance Pay

No statutory provision addresses the matter of severance pay for the executive director of a county children services board. The provision of severance pay as a fringe benefit, accordingly, is governed by the principles generally applicable to fringe benefits. Severance pay may be a permissible fringe benefit if it is awarded pursuant to a program that provides an incentive for continued employment. The payments with which you are concerned, however, were not authorized pursuant to any statute or policy in existence prior to the executive director's resignation. Severance payments granted to a single individual after the termination of employment do not serve the purpose of a fringe benefit and do not come within the power to compensate employees. *See, e.g.*, Op. No. 86-027; Op. No. 85-005; Op. No. 82-006.

Authority of a County Children Services Board to Provide Retirement Incentives that Are Reasonably Necessary to the Efficient Operation of Its Duties

It has been found, in various instances, that a public entity has authority to provide its employees with benefits that do not constitute fringe benefits but are granted, instead, to promote

the efficiency of the public entity. This concept was discussed in Op. No. 77-090 in connection with the provision of free parking to state employees. Op. No. 77-090 states in part:

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.

Op. No. 77-090 at 2-305. Op. No. 77-090 concluded that a state agency could not provide free parking to state employees as a fringe benefit, but that it could "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." Op. No. 77-090 at 2-305. Expenditures that contribute to the efficient operation of a public entity's functions clearly serve a public purpose. *See, e.g.*, Op. No. 82-006.

The principle discussed in Op. No. 77-090 has been applied in other opinions relating to the expenditure of public money for purposes that benefit public employees. *See, e.g.*, 1993 Op. Att'y Gen. No. 93-043; 1986 Op. Att'y Gen. No. 86-086 (syllabus, paragraph 2) ("[t]he State Lottery Commission may expend public funds for the provision of meals for its employees and other persons at meetings ... only where the Commission has determined that the provision of such meals is necessary to the performance of a function or duty expressly or impliedly conferred upon the Commission by statute and if its determination is not manifestly arbitrary or unreasonable"); 1983 Op. Att'y Gen. No. 83-029 (the Director of Transportation may establish a procedure for reimbursing employees for the loss, theft, or destruction of personal tools or equipment in the course of employment if the Director reasonably finds that such a procedure is necessary for the efficient operation of the Department); Op. No. 82-006 at 2-19 ("[t]he provision of meals, refreshments and other amenities by ... political subdivisions is permissible ... only if the governing body has reasonably determined that the provision of such amenities is necessary to the performance of a function or duty or to the exercise of a power expressly conferred by statute or necessarily implied therefrom"); *see also* 1986 Op. Att'y Gen. No. 86-088; 1983 Op. Att'y Gen. No. 83-042. In Op. No. 85-005, it was concluded that, even though a board of county hospital trustees did not have authority under its power to compensate to provide employees with payments to encourage their early retirement, its general authority to operate and manage the county hospital was broad enough to permit it to make such payments if it reasonably found that the payments were necessary to the efficient operation of the hospital.

In the instant case, the payments in question apply to a single individual and are not part of a program that would encourage employees to create or maintain an employee relationship with the board. Thus, it does not appear that the argument adopted in Op. No. 85-005 is applicable in this case. Further, it is not apparent on the facts presented that the proposed expenditures serve a public purpose or that they contribute to the efficient operation of the county children services board. *See, e.g.*, Op. No. 86-027; Op. No. 82-006. Unless the board reasonably finds that the payments in question are necessary to the efficient performance of its

statutory functions, it has no authority to make those payments. *See* Op. 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").

Conclusion

It is, therefore, my opinion, and you are advised:

1. A county children services board has no authority under its power to compensate and fix fringe benefits pursuant to R.C. 5153.12 to take action, after its executive director has resigned from employment with the board, to provide that former executive director with payments for severance pay, vacation, or health insurance premiums if the executive director was not entitled to such payments under a statute or policy in existence prior to the resignation.
2. A county children services board has no authority to take action, after its executive director has resigned from employment with the board, to provide that former executive director with payments for severance pay, vacation, or health insurance premiums to which the executive director was not entitled under a statute or policy in existence prior to the resignation, unless the board reasonably finds that the provision of such payments is necessary to the efficient performance of the board's statutory functions.