

5584

1. TUBERCULOSIS HOSPITAL, TRUSTEES OF COUNTY — FUNDS — MAINTENANCE AND OPERATION OF SUCH HOSPITAL — CUSTODY, COUNTY TREASURER.
2. MAJOR REPLACEMENTS AND ADDITIONS — PROVIDED FOR BY COUNTY COMMISSIONERS — SECTIONS 3139-11, 3139-12 G.C.
3. MONEY RECEIVED FROM PATIENTS AND OTHER SOURCES AND AMOUNT APPROPRIATED FROM GENERAL FUND BY COUNTY COMMISSIONERS MAY BE USED BY TRUSTEES TO OPERATE AND MAINTAIN HOSPITAL.
4. SPECIAL LEVY VOTED FOR SUPPORT OF COUNTY TUBERCULOSIS HOSPITAL — JURISDICTION, COUNTY COMMISSIONERS — UNAPPROPRIATED BALANCE — SPECIAL FUND — SECTION 5625-9 G.C.
5. MAINTENANCE, COUNTY TUBERCULOSIS HOSPITAL — COUNTY COMMISSIONERS WITHOUT POWER TO TRANSFER TO GENERAL FUND, MONEYS PRODUCED BY SPECIAL LEVY VOTED BY ELECTORS
6. WHERE HOSPITAL CAPACITY LESS THAN FIFTY BEDS — COUNTY COMMISSIONERS WOULD HAVE AUTHORITY TO SERVE AS BOARD OF TRUSTEES — NO SUCH AUTHORITY WHERE CAPACITY FIFTY BEDS OR MORE.

SYLLABUS:

1. The trustees of a county tuberculosis hospital do not have custody of the funds appropriated for the maintenance and operation of such hospital, but such funds remain in the custody of the county treasurer.

2. Under the provisions of Sections 3139-11 and 3139-12, General Code, the county commissioners and not the trustees of a county tuberculosis hospital are authorized to provide for major replacements and additions to such hospital.

3. The trustees of a county tuberculosis hospital have authority to apply money received from patients and other sources, in addition to the amount appropriated from the general fund by the county commissioners, toward the operation and maintenance of such hospital.

4. When a special levy has been voted for the support of a county tuberculosis hospital, the county commissioners are not compelled to appropriate each year the entire amount derived from such levy, but the unappropriated balance must be held in the special fund set up in

compliance with Section 5625-9, General Code, for future appropriation for the maintenance and operation of such hospital.

5. The county commissioners are without power to transfer to the general fund moneys produced by a special levy voted by the electors for maintenance of a county tuberculosis hospital, so long as such hospital is being maintained and operated.

6. Where the capacity of a county tuberculosis hospital is less than fifty beds, the county commissioners would have authority to serve as the board of trustees of such hospital, but they would not have such authority where the capacity of the hospital is fifty beds or more, even though the number of patients in the hospital was less than fifty.

Columbus, Ohio, November 6, 1942.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

I am in receipt of your letter requesting my opinion, which request reads as follows:

“House Bill 59 enacted by the Ninety Fourth General Assembly amended the laws relative to the erection, maintenance and operation of district and county tuberculosis hospitals.

May we respectfully request your opinion on the following questions:

1. Where a county hospital is operated by the county, do the trustees of the hospital have custody of the funds appropriated for the maintenance and operation of such hospital, or do such funds remain in the custody of the county treasurer?

2. If the trustees are given custody of such funds, would it be proper, if requested by the trustees, to permit such funds to remain in the county treasury, to be disbursed by the treasurer upon warrants issued by the county auditor on authority of vouchers approved by the trustees?

3. Do the laws relating to county tuberculosis hospitals authorize the county commissioners or the hospital to provide for major replacements and additions to the hospitals?

Section 3139-13 G.C. provides that all moneys received from patients or from other sources shall be applied toward the payment of maintaining the tuberculosis hospital.

4. Do the trustees have authority to expend money received from patients or from other sources, in addition to the amount appropriated from the general fund by the county commissioners for the operation and maintenance of such hospital?

5. Where a levy has been voted for the support of a county tuberculosis hospital under the provisions of Amended Senate Bill No. 4, passed by the Ninety Third General Assembly, are the county commissioners compelled to appropriate each year the full amount derived from such levy?

6. A county hospital has facilities for fifty patients. Where the average number of patients is considerable below fifty, would the county commissioners have authority to serve as the board of trustees of such hospitals?"

The answer to these questions involves a consideration of House Bill No. 59, enacted by the 94th General Assembly, as found in 119 O.L. p. 721. This act repealed former sections 3139 to 3153-7, inclusive, of the General Code, and is codified as Sections 3139 to 3139-32, inclusive. The provisions relative to county hospitals are so intertwined with those relating to district hospitals, that I find it necessary to set forth the substance or text of a number of sections apparently relating only to district hospitals. In each case the emphasis is mine.

Section 3139 places the general supervision of all hospitals for the treatment of tuberculosis under the state department of health.

Section 3139-1 authorizes the commissioners of any two or more contiguous counties, not exceeding five, upon their own initiative, and requires such commissioners upon a majority vote of the electors in each such counties, to establish a district tuberculosis hospital. For such purpose the several boards of county commissioners shall form themselves into a joint board for the purpose of constructing, equipping and maintaining such district hospital.

Section 3139-3 requires such joint board of commissioners to appoint a board of trustees in whom shall be vested the management and control of such district tuberculosis hospital, said board consisting of one member from each county in the district. These trustees are to serve without compensation.

Section 3139-4 authorizes such board of trustees to select a site, prepare plans and proceed to acquire or erect and equip the necessary buildings for a district tuberculosis hospital. The trustees are further authorized to "receive and hold in trust for the use and benefit of such institution any grant or devise of land, and any donation or bequest of money or other personal property that may be made for the establishment or support thereof."

Section 3139-5 reads as follows:

"The first cost of the hospital, and the cost of all better-

ments, repairs and additions thereto, as determined by the board of trustees, shall be paid by the counties comprising the district, in proportion to the taxable property of each county as shown by their respective duplicates. To meet the expense incurred in the purchase of a site or enlargement thereof, and for the erection and equipment of buildings, or for the purpose of enlarging, improving or rebuilding thereof, or for purchasing an interest in a district tuberculosis hospital, the commissioners may borrow such sum or sums of money as may be apportioned to the county, at a rate of interest not to exceed five per cent per annum, and issue and sell the bonds of the county to secure the payment of the principal and interest thereof. Such principal and interest shall be paid as provided in section 2293-8 of the General Code. A statement shall be prepared annually showing the per capita daily cost for the current expenses of maintaining such hospital, including the cost of ordinary repairs, and each county in the district shall pay its share of such cost as determined by the number of days the total number of patients from such county have spent in the hospital during the year, but any sums paid by the patients from such county for their treatment therein shall be deducted from this amount. *The boards of county commissioners of counties jointly maintaining a district hospital for tuberculosis shall make annually an appropriation or otherwise provide sufficient funds to support, and to defray the necessary expense, of maintenance of such hospital.*"

Section 3139-6 reads as follows:

"All taxes levied by the county commissioners of any county under the provisions of section 6 (G.C. sec. 3139-5) of this act shall, when collected, be paid over to the trustees of the district tuberculosis hospital, upon the warrant of the county auditor, at the same time that school and township moneys are paid to the respective treasurers; and the board of trustees shall receipt therefor and *deposit such funds to its credit in banks or trust companies* to be designated by it and said banks or trust companies shall give to said board, a bond therefor in an amount at least equal to the amount as so aforesaid deposited; and thereupon said funds may be disbursed by said board of trustees for the uses and purposes of said district tuberculosis hospital, and accounted for as provided in the foregoing sections. *Each trustee shall give bond for the faithful performance of his duties* in such sum as may be fixed by the joint board of county commissioners. The expense of such bond shall be paid out of the fund for the maintenance of the hospital. The bond of each trustee, after having been approved by the joint board of county commissioners, shall be filed with the auditor of the county which he represents."

Section 3139-10 outlines the general powers of the board of trustees of such district hospital, including the appointment of a medical superintendent and assistants; authorizes the board to fix the amount to be

paid by any applicant for admission, not exceeding the actual cost of his care and treatment, and where such applicant or any person legally responsible for his support is unable to pay the full cost of such care and treatment, this section provides that the deficiency shall be paid by the county in which such applicant or patient has a legal residence. The trustees are further required to keep an account of money received from patients or from other sources, which shall be applied toward the maintenance of the hospital.

As bearing directly on county tuberculosis hospitals, I note the following sections of the General Code:

Section 3139-11:

“The county commissioners of any county having more than 50,000 population as shown by the last federal census may, with the consent of the state department of health, provide the necessary funds for the purchase of a site or sites and the erection and equipment of the necessary buildings thereon, for the operation and maintenance of one or more county hospitals for the care and treatment of persons suffering from tuberculosis, and for the purchase or lease of one or more municipal tuberculosis hospitals located in said county. The county commissioners maintaining a county tuberculosis hospital may receive for the use of such hospital, and in its name, gifts, legacies, devises and conveyances of real or personal property or money.”

Section 3139-12:

“In any county where a county hospital for tuberculosis has been purchased, leased or erected, *such county hospital for tuberculosis shall be maintained by the county commissioners*, and for the purpose of maintaining such hospital the county commissioners *shall annually appropriate* and set aside the sum necessary for such maintenance. Such sum shall not be used for any other purpose. When it shall become necessary to *enlarge, repair or improve* a county hospital for tuberculosis, *the county commissioners shall proceed* in the same manner as provided for other county buildings.”

Section 3139-13 makes provision for the management and control of such county tuberculosis hospital and reads as follows:

“The management and control of such county tuberculosis hospital shall be vested in a board of trustees consisting of three members who shall be appointed by the county commissioners for a term of three years, provided that of the appointments first made, one shall be for one year, one for two years, and one for three years, and thereafter one shall be appointed annually

on the first day of April for a term of three years. All vacancies shall be filled by the county commissioners for the unexpired term. Such board of trustees shall have all the powers conferred by law upon the board of trustees of a district hospital for the care of persons suffering from tuberculosis. Provided that in *hospitals of less than fifty beds* the board of county commissioners may serve as a board of trustees. All laws applicable to the *levy* of taxes for the purchase, lease, erection, maintenance, betterments, repairs and operation of a district hospital shall apply to the leasing, erection, operation, maintenance, betterments and repairs of said county hospital for the care and treatment of persons suffering from tuberculosis. An accurate account shall be kept of all moneys received from patients or from other sources, which shall be applied toward the payment of maintaining the tuberculosis hospital. The board of trustees shall, on the third Monday in March of each year, file with the county commissioners and with the state department of health an annual report of the operation of the county tuberculosis hospital including a statement of receipts and disbursements during the past calendar year."

In order to arrive at an answer to your first question relative to the custody of the funds appropriated for the maintenance and operation of a county hospital, it is necessary to give particular attention to certain provisions of the sections last above quoted, read in connection with the sections hereinabove quoted relating to district hospitals.

Section 3139-5, which relates to district hospitals, requires the first cost of the hospital and the cost of all betterments, repairs and additions thereto, as determined by the board of trustees, to be "paid by the counties comprising the district, in proportion to the taxable property of each county as shown by their respective duplicates." Each county is authorized to borrow such sums as may be apportioned to it and may issue bonds therefor. That section further requires each county to pay its share of the cost of maintaining such hospital, including the cost of ordinary repairs, as determined by a statement to be prepared annually by the trustees, such share being based on the number of days the total number of patients from each county have spent in the hospital during the year, less such sums as have been paid by the patients from such county. The last sentence of this section provides:

"The boards of county commissioners of counties jointly maintaining a district hospital for tuberculosis shall make annually an appropriation or otherwise provide sufficient funds to support, and to defray the necessary expense, of maintenance of such hospital."

Section 3139-6, which also refers to district hospitals, provides that all taxes levied by the commissioners of any county under the provisions of Section 6 of this act (G.C. 3139-5) shall, when collected, be paid over to the trustees of the district who shall deposit said funds in banks or trust companies to be designated by it, which banks or trust companies shall give bond to said board; and thereupon said funds shall be disbursed by said board of trustees.

This section further makes this significant provision:

“Each trustee shall give bond for the faithful performance of his duties in such sum as may be fixed by the joint board of county commissioners.”

Coming now to a consideration of Section 3139-13, which provides for the management and control of a county tuberculosis hospital, it will be noted that such management is vested in a board of trustees consisting of three members to be appointed by the county commissioners, and the statute provides:

“Such board of trustees shall have all the powers conferred by law upon the board of trustees of a district hospital for the care of persons suffering from tuberculosis.”

This section further provides:

“All laws applicable to the levy of taxes for the purchase, * * * repairs and operation of a district hospital shall apply to the leasing, erection, operation, maintenance, betterments and repairs of said county hospital for the care and treatment of persons suffering from tuberculosis.”

It is significant that the trustees of such county tuberculosis hospital are not required to give bond.

The answer to your first question depends largely upon the meaning of the language just quoted from Section 3139-13. What is meant by “all the powers conferred”? Does the provision that “all laws applicable to the *levy* of taxes shall apply to,” etc., carry with it a mandate that all taxes *collected* pursuant to the levy shall be paid over to the trustees of the county hospital and deposited and expended by them in the same manner, as is provided by Section 3139-6, as to taxes levied and collected for the use of the trustees of a district hospital? In my opinion

the above provision, conferring upon the board of trustees of a county hospital all the powers conferred by law on a board of a district hospital, relates to their powers in the management and control of the hospital. That, as a matter of fact, is all that the section purports to cover. It does not necessarily or naturally include the provision of Section 3139-6, requiring the funds raised by taxation in the several counties to be paid over to the trustees and kept in their custody. The reason for such provision in Section 3139-6 as to the custody of the funds of the district does not apply to funds made available for the operation of the county hospital. The trustees of the district constitute a body not representing any one county, and there would be no one county treasurer who would properly or naturally be the custodian of their funds; therefore, the statute provides that as to such district trustees, the funds provided by the several counties are to be paid over to them, and they are then required, rather than empowered, to deposit the same in banks or trust companies, taking a bond to secure such deposit, and are given the right to disburse the funds so committed to them. In the case of a hospital belonging to a county, the county treasurer is the natural and proper custodian of the funds provided by that county.

Furthermore, the requirement that the trustees of the district hospital shall give bond, while the trustees of the county hospital are not required to give any bond, evidently grows out of the fact that the funds of the former are committed to their custody, whereas there is no clear evidence of an intent on the part of the Legislature to turn over to the trustees of a county hospital the custody of the funds which they are to expend in the operation of a county hospital.

The Legislature did not say that all laws applicable to the levy, collection and custody of taxes for the district hospital should apply to the county hospital. The Legislature only said "all laws applicable to the *levy* of taxes."

I have therefore no difficulty in arriving at the conclusion that the trustees of a county hospital do not under this legislation have custody of the funds appropriated for the maintenance and operation of such hospital and that such funds must remain in the custody of the county treasurer. This view is further strengthened by the provisions of Section 3139-12, which provides that such county hospital for tuberculosis shall be maintained by the county commissioners, and for the purpose of main-

taining such hospital the county commissioners shall annually appropriate and set aside the sum necessary for such maintenance; and by the further provision that "when it shall become necessary to enlarge, repair or improve a county hospital for tuberculosis, the county commissioners shall proceed in the same manner as provided for other county buildings."

In view of this conclusion, it is unnecessary to answer your second question.

Referring to your third question -- "Do the laws relating to county tuberculosis hospitals authorize the county commissioners or the hospital to provide for major replacements and additions to the hospital?" It appears to me that that question is answered by Section 3139-11. There it is provided that the county commissioners shall provide the funds necessary for the erection and equipment of a county hospital and for its operation, and that the *county commissioners* so maintaining a hospital may "receive for the use of such hospital, and in its name, gifts, legacies," etc., in contrast with the provision of Section 3139-4, which authorizes the trustees of the district hospital to receive and hold such gifts, etc. Furthermore, the provisions of Section 3139-12, above quoted, place upon the county commissioners, and not upon the board of trustees, the duty to proceed when necessary to enlarge, repair and improve a county tuberculosis hospital. Nowhere do the statutes give the board of trustees of a county hospital the power either to build or enlarge such county hospital. Their duties appear to be confined to the management and control of such institution.

In answer to your fourth question, it appears to me to be quite clear from the provisions of Section 3139-12, taken in connection with Section 3139-13, that the trustees have authority to spend money received from patients or other sources in addition to the amount appropriated by the county commissioners for the operation and maintenance of the county hospital. Section 3139-12 expressly provides that the county commissioners shall annually appropriate the sum necessary for the maintenance of the hospital, and Section 3139-13, which outlines the duties of the board of trustees, provides:

"An accurate account shall be kept of all moneys received from patients or from other sources, which shall be applied toward the payment of maintaining the tuberculosis hospital."

The use of the words "applied toward" can have no other meaning except that such funds so received from patients shall be used in connection with the amount appropriated by the county commissioners for the purpose stated, to-wit, the maintenance and operation of the hospital.

Your fifth question raises the question whether, when a tax levy has been voted by the electors for the support of a county tuberculosis hospital, the county commissioners are required to appropriate each year the full amount derived from such levy. It appears from correspondence attached to your letter that this vote was taken pursuant to a later statute than the one you mention, passed by the 94th General Assembly and found in 119 O.L., 170. This act provides in part as follows:

"At any time prior to the thirty-first day of December, 1942, the taxing authority of any subdivision, 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 5625-15 of the General Code, or to supplement general fund appropriations for one or more of the following purposes: relief, welfare, hospitalization, health, and support of general or tuberculosis hospitals, * * *"

The act further provides for the submission of the question to a vote of the electors, and in case of a favorable vote it further provides as follows:

"* * * the taxing authority of the subdivision *may* forthwith make the necessary levy within such subdivision at the additional rate or *at any lesser rate* outside the ten mill limitation on the tax list for the purpose stated in the resolution, * * *"

All of the language of this statute is clearly permissive so far as the taxing authority is concerned. The county commissioners, in the case we are considering, are not required to pass the resolution calling for a submission to the electors, but "may" do so. If the vote is favorable, they are not required to make the levy, but "may" do so. If they do make the levy, they are not required to make it at the full rate authorized by the electorate, but may fix it at any lesser rate. In all proceedings of this character, where the taxing authorities go to the people for authority either to issue bonds or levy taxes, their appeal to the people is purely

for additional authority, and does not result in a mandate. This was the view expressed by the court in the matter of the issuance of bonds pursuant to a vote of the electors, in the case of *State ex rel. v. Commissioners*, 122 O.S. 456. It is likewise supported by an opinion of one of my predecessors, found in 1930 Opinions of the Attorney General, p. 1926, the syllabus of which reads as follows:

“An authorization of an issuance of bonds by the electors of a subdivision places no mandatory duty upon the taxing authority to issue the bonds so authorized or any part thereof.

In the event the taxing authority, after the question of issuing bonds has been favorably voted upon by the electors, determines that the issuance of such bonds is not necessary, there is nothing to preclude such taxing authority from thereafter determining that their issuance is necessary and proceeding under the provisions of Sections 2293-25 to 2293-29 inclusive, of the General Code.”

The letter from the county commissioners of Licking County accompanying your communication raises the further question whether the portion of this special levy which the commissioners fail to appropriate may be placed in the general fund of the county.

Section 5625-9 requires the establishment of certain specified funds; among others, (d) a special fund for each special levy.

Section 5625-13 provides the manner in which moneys may be transferred from one fund to another. Paragraph (d) of this section reads as follows:

“Unless otherwise provided by law, the unexpended balance in any special fund, other than an improvement fund, existing in accordance with section 5625-9, paragraphs (d), (f), or (g) or section 5625-11 of the General Code, may be transferred to the general fund or to the sinking fund or bond retirement fund after the termination of the activity, service or other undertaking for which such special fund existed, but only after the payment of all obligations incurred and payable from such special fund.”

It is clear that under this section no part of the money realized from this special levy could be transferred to the general fund unless and until the operation of the hospital shall have been terminated. However, a later enactment, Section 5625-13a, makes further provision for transfer by order of the court of common pleas. That section reads as follows:

“In addition to the transfers authorized in section 5625-13, the taxing authority of any political subdivision may, in the manner hereinafter provided, transfer from one fund to another any public funds under its supervision except the proceeds or balances of loans, bond issues, or special levies for the payment thereof, and except the proceeds or balances of funds derived from any excise tax levied by law for a specified purpose or purposes, and except the proceeds or balances of any license fees imposed by law for a specified purpose or purposes.”

The subsequent sections set forth the procedure necessary to obtain said court order, and Section 5625-13f provides:

“If, upon the hearing the court finds that the notice has been given as herein required, that the petition states sufficient facts, that there are good reasons, or that a necessity exists for the transfer, and that no injury will result therefrom, it shall grant the prayer of the petition and order the petitioners to make such transfer.”

It therefore follows that in the situation now under consideration the county commissioners would have no authority to transfer the balance of the proceeds of this tax levy to any other fund so long as the hospital is operated, but that if would be possible, by order of the court as above set forth, and in no other way, to accomplish such transfer. The portion of such fund which now remains unappropriated would, of course, be held subject to future appropriation for the purpose for which it was levied.

In this connection I call attention to a portion of the syllabus in the case of *Niles v. Ice Corporation*, 133 O.S. 169, where it is held:

“Section 5625-13a General Code, permitting political subdivisions to transfer ‘any public funds under its supervision’ to another fund, does not release municipal corporations from the limitations upon their taxing power, imposed by the Constitution.”

Your sixth question raises the question as to the right of the county commissioners to serve as the board of trustees of the county tuberculosis hospital without the appointment of a board of trustees, as provided by Section 3139-13. The condition under which this may be done is set forth in one sentence of that section, reading as follows:

“Provided that in hospitals of less than fifty beds the board of county commissioners may serve as a board of trustees.”

Very plainly this provision has reference to the capacity of the hospital and not to the number of beds that may at one time or another be occupied by patients. The law intends that if the hospital is small enough that it contains less than fifty beds, the commissioners are not required to appoint a board of trustees, but may manage it themselves. If the hospital contains fifty or more beds, it is required to appoint a board of trustees. It is evident that a large hospital might under some conditions and for a time not be full of patients. It is equally evident that, under other conditions, for a time it might be full to overflowing. It is the number of beds and not the number of patients that determines.

Specifically answering your questions, it is my opinion:

1. The trustees of a county tuberculosis hospital do not have custody of the funds appropriated for the maintenance and operation of such hospital, such funds remaining in the custody of the county treasurer.

2. Answer to this question is rendered unnecessary by the answer to question number 1.

3. The laws relating to county tuberculosis hospitals authorize the county commissioners and not the trustees of the hospital to provide for major replacements and additions to the hospital.

4. The trustees of a county tuberculosis hospital have authority to expend money received from patients or other sources in addition to the amount appropriated from the general fund by the county commissioners for the operation and maintenance of such hospital. Such trustees would also have the right to devote moneys received from gifts for such purposes in so far as such gifts were not designated by their donors for some other specific purpose.

5. Where a levy has been voted for the support of a county tuberculosis hospital under the provisions of the statute, the county commissioners are not compelled to appropriate each year the entire amount derived from such levy, but the unappropriated balance would remain in the special fund subject to future appropriation for the purposes aforesaid.

6. Where the capacity of a county tuberculosis hospital is less than fifty beds, the county commissioners would have authority to serve as the

board of trustees of such hospital, but they would not have such authority where the capacity of the hospital is fifty beds or more, even though the number of patients in the hospital was less than fifty.

Respectfully,

THOMAS J. HERBERT
Attorney General.