

OPINION NO. 92-049**Syllabus:**

1. R.C. 315.12(A) authorizes the use of receipts of the motor vehicle fuel tax distributed to the counties pursuant to R.C. 5735.27 to pay a portion of the cost of the operation of the office of county engineer, which costs may include the payment of fringe benefits, including an annual bonus, subject to the limitations imposed by R.C. 325.17.
2. The moneys in a ditch maintenance fund established pursuant to R.C. 6137.02 may not be used to pay an annual bonus to an employee of the office of county engineer.

To: R. Kelly Ormsby III, Paulding County Prosecuting Attorney, Paulding, Ohio

By: Lee Fisher, Attorney General, September 29, 1992

You have requested an opinion concerning the authority of the county engineer to pay to his employees "incentive compensation" in the form of "year end" bonuses over and above their regular salaries from gas tax revenues and ditch maintenance funds.

The County Engineer Has Authority Pursuant to R.C. 325.17 to Determine the Compensation, Including Fringe Benefits, of Employees of the Office of County Engineer

The office of county engineer is a creature of statute, R.C. 315.01, and, therefore, the authority of the county engineer is limited to that expressly granted by statute and the authority necessarily implied by that express grant. *State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916). There are no statutes which expressly permit the county engineer to pay his employees a bonus as incentive compensation. Thus, it must be determined whether the statutes which establish and govern the office of county engineer necessarily imply such authority.

The "year end bonus," as you have described it, is an annual payment made as incentive compensation to employees of the county engineer in addition to their normal salaries. Presumably, this bonus is intended to reward an employee for a superior job performance during the preceding year and to induce the employee to continue to perform well in the future as an employee of the county engineer. In this respect, a year end or annual bonus can be regarded as a "fringe benefit." "The purpose of an employer, whether public or private, in extending 'fringe benefits' to an employee is to induce the employee to continue his current employment." *Madden v. Bower*, 20 Ohio St. 2d 135, 137, 254 N.E.2d 357, 359 (1969).

The county engineer is expressly authorized by R.C. 325.17 to employ the necessary employees for the office of county engineer and to fix their compensation. The courts in Ohio have held "compensation" to include fringe benefits. *Ebert v. Board of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098, 1100 (1980) ("sick leave credits, just as other benefits, are forms of compensation"); see also *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976) (characterizing group medical and hospital insurance payments made on behalf of county officers as fringe benefits constituting compensation to those officers); 1981 Op. Att'y Gen. No. 81-052. As the *Parsons* court noted:

Fringe benefits...are valuable perquisites of an office, and are as much

a part of the compensations of office as a weekly pay check. It is obvious that an office holder is benefitted and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and only then transmitted to the insurance company. Such payments for [fringe] benefits may not constitute "salary" in the strictest sense of the word, but they are compensation.

46 Ohio St. 2d at 391, 348 N.E.2d at 694. Thus, an annual or periodic bonus, as a fringe benefit, would be compensation. Since R.C. 325.17 expressly empowers the county engineer to fix the compensation of the employees of that office, and compensation includes fringe benefits, the county engineer has the authority to provide annual bonuses to those employees. *See generally* Op. No. 81-052 at 2-202 (the authority to provide a fringe benefit "flows directly from the authority to set compensation").

Board of County Commissioners May Limit Aggregate Compensation Payable by County Engineer to Employees

It must be cautioned, however, that the power of the county engineer to fix the compensation of the employees of that office, and accordingly to provide annual bonuses, is limited by R.C. 325.17. The compensation fixed by the county engineer for the employees of that office "shall not exceed, in the aggregate...the amount fixed by the board of county commissioners for such office." R.C. 325.17; *see also County Comm'rs v. Rafferty*, 19 Ohio N.P. (n.s.) 97 (C.P. Henry County 1916). Although the county engineer may determine the amount of compensation, including year end bonuses, to be paid to each of his employees, the county engineer may not set such compensation at amounts which, in the aggregate, exceed the total appropriated for that office by the board of county commissioners.

Source of Payment of Bonuses

You have asked specifically whether the annual bonus granted by the county engineer to his employees may be paid from gasoline tax revenues paid to the county or from the ditch maintenance fund. You have indicated that by "gasoline tax revenues paid to the county" you mean the county's share of the motor vehicle fuel excise tax imposed by R.C. 5735.05 and R.C. 5735.25. *See* R.C. 5735.23 (designating the funds to which the receipts of the tax imposed by R.C. 5735.05 shall be paid, including the gasoline excise tax fund); R.C. 5735.27 (creating the gasoline excise tax fund in the state treasury and providing for payment of a portion thereof to the counties for the road and highway purposes described in the statute); R.C. 5735.26 (designating the funds to which the receipts from the tax levied by R.C. 5735.25 are to be paid and specifying that a certain percentage is to be paid to the gasoline excise tax fund for distribution to the counties pursuant to R.C. 5735.27(A)(4)). You have also indicated that the "ditch maintenance fund" is the fund established by the board of county commissioners of each county pursuant to R.C. Chapter 6137 (ditch maintenance fund). R.C. 6137.02, *inter alia*, mandates the establishment of a fund "for the repair, upkeep, and permanent maintenance of each improvement constructed under Chapter 6131 of the Revised Code." R.C. Chapter 6131 (single county ditches) defines "improvement" to include ditches. R.C. 6131.01(C). *See generally* 1982 Op. Att'y Gen. No. 82-021.

R.C. 315.12(A) Authorizes the Use of Receipts of the Motor Vehicle Fuel Tax Distributed to the Counties Pursuant to R.C. 5735.27 for a Portion of the Cost of the Operation of the Office of County Engineer, Including the Payment of Employee Fringe Benefits

With respect to the use of tax revenues generally, Ohio Const. art. XII, §5 mandates that "every law imposing a tax shall state, distinctly, the object of the

same, to which only, it shall be applied." In consideration of the motor vehicle fuel tax specifically, Ohio Const. art. XII, §5a states as follows:

No moneys derived from fees, excises, or license taxes relating to...fuels used for propelling...vehicles [on public highways], shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

Thus, revenues derived from motor vehicle fuel excise taxes may be used only for the purposes described in the statutes governing the levying, collection and distribution of those taxes. See *Grandle v. Rhodes*, 169 Ohio St. 77, 157 N.E.2d 336 (1959); see also 1988 Op. Att'y Gen. No. 88-067.

The use of motor vehicle fuel tax excise revenues has been discussed in a number of prior opinions of the Attorney General, which have generally favored a strict construction of the applicable statutes. See, e.g., 1988 Op. Att'y Gen. No. 88-004 (revenues of the motor vehicle fuel excise tax are not available for the construction of a building for the county engineer except one used exclusively to house road machinery and equipment); 1985 Op. Att'y Gen. No. 85-094 (moneys derived from the motor vehicle fuel excise tax may not be used to purchase insurance to protect the county commissioners against liability resulting from the failure to keep roads in proper repair); 1980 Op. Att'y Gen. No. 80-016 (motor vehicle fuel excise tax may not be used to purchase fire and theft insurance covering county road machinery or liability insurance covering county employees who operate county road machinery). However, Op. No. 88-067 determined that the motor vehicle fuel excise tax revenues may be used for payment of a portion of a county self-insurance program pursuant to R.C. 2744.08(A)(2)(a), based on an analysis of R.C. 315.12, which provides in relevant part as follows:

(A) Two-thirds of the cost of operation of the office of county engineer, including the salaries of all of the employees and the cost of the maintenance of such office as provided by the annual appropriation made by the board of county commissioners for such purpose, shall be paid out of the county's share of the fund derived from the receipts from motor vehicle licenses, as distributed under section 4501.04 of the Revised Code, and from the county's share of the fund derived from the motor vehicle fuel tax as distributed under section 5735.27 of the Revised Code.

The opinion determined that the insurance payments were a cost of operating the office of county engineer, and, therefore, pursuant to R.C. 315.12(A), the county's share of the motor vehicle fuel tax could be expended for that purpose. See Op. No. 88-067.¹

Applying such analysis, the cost of an annual bonus, as a form of compensation of employees of the county engineer, would similarly constitute part

¹ 1988 Op. Att'y Gen. No. 88-067 also concluded that the language of R.C. 315.12(A) reflects "a presumption on the part of the General Assembly that no less than two thirds of the costs of operating the office of the county engineer are directly related to the statutorily-enumerated purposes for which state motor vehicle license tax and motor vehicle fuel excise tax revenues may be expended." *Id.* at 2-343. Op. No. 88-067 recognized that the use of these revenues pursuant to R.C. 315.12(A) thus satisfies the

of the cost of operating the office of county engineer, which may be paid in part out of motor vehicle fuel tax revenues. This conclusion is consistent with judicial construction of the applicable statutes. See, e.g., *Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969) (health insurance premiums paid on behalf of employees of the office of county engineer as a fringe benefit is part of the total cost of the operation of that office, two-thirds of which must be paid from motor vehicle fuel tax revenues pursuant to R.C. 315.12); *Board of County Comm'rs v. Scioto County Budget Comm'n*, 17 Ohio St. 2d 39, 244 N.E.2d 888 (1969) (R.C. 315.12 requires that at least two-thirds of the cost of the office of county engineer must be paid from motor vehicle license tax and motor vehicle fuel tax revenues).

The Proceeds of a Maintenance Fund Established Pursuant to R.C. 6137.02 May Not Be Used to Pay an Annual Bonus to an Employee of the Office of County Engineer

The purpose for the maintenance funds established by each county pursuant to R.C. 6137.02 is the repair, upkeep, and permanent maintenance of each improvement constructed under R.C. Chapter 6131 (single county ditches), R.C. Chapter 6133 (joint county ditches), and R.C. Chapter 6135 (interstate county ditches). The use of these funds is controlled by R.C. 6137.05, which states that "[t]he maintenance fund created under authority of section [6137.02] of the Revised Code shall be subject to use of the board of county commissioners...for the necessary and proper repair or maintenance of any improvement constructed under sections 6131.01 to 6131.64, 6133.01 to 6133.15, and 6135.01 to 6135.27 of the Revised Code." (Emphasis added.) Thus, the use of the ditch maintenance fund established pursuant to R.C. 6137.02 is strictly limited by R.C. 6137.05 to use by the county commissioners for the repair and maintenance of the improvements described in that statute. Disbursements from the maintenance funds established under R.C. 6137.02 may be made in two ways. If the repair or maintenance of the improvement is made by force account,² "then the board shall cause the proper work to be done by that method under the supervision of the county engineer and certify the costs [of the necessary work and material] to the county auditor...for payment from the maintenance fund." R.C. 6137.05(A). If the work is to be done by contract,

the board shall cause the engineer to prepare proper specifications, covering the requirements for the particular case, to advertise for bids

requirement of Ohio Const. art. XII, §5a that revenues derived from the state motor vehicle license taxes and motor vehicle fuel excise taxes "be expended for only those purposes described in the several statutes that govern the levying, collection, and distribution of such taxes." Op. No. 88-067 at 2-339.

² The term "force account" is not defined for purposes of R.C. 6137.05. However, it is defined in R.C. Chapter 5543 (duties of county engineer) as follows:

"Force account," as used in [R.C. 5543.19] means that the county engineer will act as contractor, using labor employed by him using material and equipment either owned by the county or leased or purchased in compliance with sections 307.86 to 307.92, inclusive, of the Revised Code and excludes subcontracting any part of such work unless done pursuant to sections 307.86 to 307.92, inclusive, of the Revised Code.

R.C. 5543.19(C); see also *McMichael v. Van Ho*, 8 Ohio Misc. 281, 219 N.E.2d 831 (C.P. Paulding County 1966) ("force account" means the direct employment of labor and the direct use of the necessary means for completing a particular project); *Pincelli v. The Ohio Bridge Co.*, 26 Ohio Op. 2d 460, 198 N.E.2d 483 (C.P. Athens County 1964).

thereon, as in the case of original construction under section 6131.24 of the Revised Code, and to let the contract for the required work and material to the lowest and best bidder, who, upon the performance of the work certified by the engineer, shall certify the same to the auditor...for payment from the maintenance fund.

Id. Thus, payments from the maintenance fund are to be made only for the cost of the necessary work and material required for the particular improvement in question, whether the improvement is accomplished by force account or by contract. Unlike revenues of the motor vehicle fuel tax pursuant to R.C. 315.12, none of the money in the ditch maintenance fund is authorized to be disbursed for the general operation of the office of the county engineer. Accordingly, it would be inappropriate to use the proceeds of a maintenance fund established pursuant to R.C. 6137.02 to pay an annual bonus to an employee of the county engineer, since the payment of such a bonus cannot be characterized as a portion of the cost of the necessary work and material required for any *particular* improvement.

Conclusion

On the basis of the above analysis, it is my opinion, and you are hereby advised, that:

1. R.C. 315.12(A) authorizes the use of receipts of the motor vehicle fuel tax distributed to the counties pursuant to R.C. 5735.27 to pay a portion of the cost of the operation of the office of county engineer, which costs may include the payment of fringe benefits, including an annual bonus, subject to the limitations imposed by R.C. 325.17.
2. The moneys in a ditch maintenance fund established pursuant to R.C. 6137.02 may not be used to pay an annual bonus to an employee of the office of county engineer.