OPINION NO. 82-011

Syllabus:

1. If a service is performed for a public office by an office of county government, whether on a mandatory or discretionary basis, a board of county commissioners may not charge the office receiving such service unless there is express statutory authorization for such charge or authority implied from an express power.

2. Pursuant to R.C. 307.85, a board of county commissioners may charge a public office for services provided by an office of county government to the extent necessary to collect federal reimbursement funds which have been specifically provided for such purpose.

3. If a board of county commissioners has the authority, either express or implied, to charge for services rendered to a public office by an office of county government and if the office receiving such services is otherwise subject to the requirements of R.C. 5705.41(D) with respect to certification of availability of funds to pay the county, such certification is a prerequisite to payment by the office receiving the services.

4. When a county office performs services for another public office and a board of county commissioners has either express or implied authority to charge for the provision of such services, in

the absence of express statutory provision directing the method for determining the terms of exchange, such terms should be determined in a reasonable manner.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, March 4, 1982

I have before me your request for my opinion concerning whether a public office may be charged for services performed by an office of county government. Your office has described the situation as follows:

> On the basis of the cost allocation plan prepared to [fulfill] the federal requirements, boards of county commissioners are billing various county and public offices for the cost allocated to the offices for centralized services rendered to them. Typically, each office is charged for building use, building maintenance, property insurance, and personnel insurance (each provided through the board of county commissioners), legal service (provided by the county prosecuting attorney), management and disbursement of funds (provided by the county treasurer), accounting services (provided by the county auditor), and the allocated cost of equipment used to provide such centralized services. Each office is requested to prepare a voucher for payment to the county general fund from the appropriations for the operation of that office. On the basis of the approved voucher a warrant is drawn in favor of the general fund and against the appropriation account of the office. These charges are often levied for services where no federal program is involved. Where federal programs are involved the federal government does not require preparation of a voucher and warrant, although the Ohio Department of Public Welfare requires preparation of the voucher and warrant as documentation of the costs charged to federal programs under their administration.

With these facts in mind you ask the following questions:

1. Where an office of county government is statutorily required to provide services to other public offices, in the absence of specific statutory authorization may the costs of providing such services properly be charged to the office receiving such services, either through a direct billing or a charge to that office's appropriation, or must the cost be paid from the operating funds of the office providing the services?

2. Where an office of county government possesses the discretionary authority to provide services to other public offices, in the absence of specific statutory authorization may the costs of providing such services properly be charged to the office receiving such services, either through a direct billing or a charge to that office's appropriation, or must the cost be paid from the operating funds of the office providing the services?

3. Is the answer to questions number 1 and 2 above, affected by the fact that the program for which the services were rendered is a federal program, for which costs identified under Federal Management Circular No. 74-4 may be reimbursed? Your attention is directed to Section 307.85, Revised Code, which authorizes county participation in federal programs.

4. If an office of county government possesses the authority, either on a discretionary or mandatory basis, to provide services to other public offices, and an office which is to receive such

services is otherwise subject to the requirements of Section 5705.41(D), Revised Code, with respect to the certification of the availability of funds, is a certificate under this Section a prerequisite to payment on the part of the recipient of services?

5. If the answer to question number 4 above, is in the affirmative, by what method are the terms of the exchange (price, services to be rendered, time of payment, etc.) to be determined, and at what time is the appropriate line-item account of the office receiving the service to be encumbered?

Although I appreciate your need for a clarification of the questions posed, they are of such general nature that it is impossible to answer them comprehensively. Therefore, I have set forth the following statement of the law which should be of help to you in determining on a case by case basis whether any particular charge levied by a board of county commissioners is permissible.

In your first two questions you ask whether the cost of a service performed by an office of county government on either a mandatory or discretionary basis may be charged by the county commissioners to another public office receiving the service. It is well established that boards of county commissioners are creatures of statute which may exercise only those powers expressly granted by statute and those necessarily implied therefrom. See, e.g., State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921); 1979 Op. Att'y Gen. No. 79-026; 1975 Op. Att'y Gen. No. 75-070. I am not aware of any express provision of law which permits a board of county commissioners to charge public offices for the provision of all services rendered by county offices. Therefore, if such a power does exist for any particular service it must be expressly granted or necessarily implied from an express power.

You suggest in your letter of request that an implied power in a board of county commissioners to charge for any services under any circumstances may not be found since the legislature has specifically provided for the distribution of certain costs in various manners. The four statutes set forth in your letter of request are R.C. 305.171 (provision of health insurance for county employees by county commissioners), R.C. 307.846 (services provided by automatic data processing board), R.C. 307.806 (services provided by microfilming board), and R.C. 117.15 (expenses of audits performed by the Bureau of Inspection and Supervision of Public Offices).[1] When applied to this situation, the rule of expressio unius est exclusio alterius, which provides that the mention of one class of subjects in a statute or statutes implies the exclusion of all others, might lead to the implication that the cost to a county of providing a service to its several component parts or to another public office independent of the county may be charged to the office receiving such service only where specific statutory provision therefor has been made. See Kroger Co. v. Bowers, 3 Ohio St. 2d 76, 209 N.E.2d 209 (1965); State ex rel. Boda v. Brown, 157 Ohio St. 368, 105 N.E.2d 643 (1952).

Such a conclusion, however, may not clearly be drawn from the four statutes set forth above. Three of the statutes to which you have referred do not deal with the authority of a board of county commissioners to charge, but rather, authorize other boards and officers to charge. R.C. 307.806 (microfilming board); R.C. 307.846 (data processing board); R.C. 117.15 (Auditor of State, county auditors).

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[1] You have referred to these provisions as "statutes providing for a distribution of centralized service costs" (emphasis added). It is not clear from the four statutes cited what types of services would be considered "centralized." For purposes of comparison, Am. Sub. H.B. 694, section 99 (uncodified), 114th Gen. A. (1981) (eff. Nov. 15, 1981), defines "centralized services" for purposes of state budgeting procedures as "all services provided by the Attorney General, Auditor of State, and any other agency receiving General Revenue Funds providing such services."

Additionally, no distinction can be drawn from those four statutes with regard to the ability of a board of county commissioners to charge for mandatory or discretionary services. R.C. 117.15 (charges for mandatory duty); R.C. 305.171 (charges for discretionary purchase of medical insurance). Thus, R.C. 117.15, 307.806, 307.846 and 305.171 do not set up a category of situations in which a board of county commissioners must be expressly permitted by statute to charge for services performed by county officers. I, therefore, conclude that whether any particular service is provided by an office of county government on a mandatory or discretionary basis, a board of county commissioners may not charge the public office receiving such service unless there is express statutory authorization for such charge or authority necessarily implied from an express power. State ex rel. v. Cappeller, 39 Ohio St. 207 (1883) (the state is not liable to contribute to the payment of county officers or their assistants except "by virtue of some statute, either expressly or by necessary implication authorizing such charge").

While I have concluded that there is no basis for distinguishing between mandatory and discretionary services with regard to the legal requirements for charging for the provision of such service, it does appear that where services are performed on a discretionary basis the ability to charge for the provision thereof may be more easily implied. Cf. Strawn v. Commissioners, 47 Ohio St. 404, 26 N.E. 635 (1890) (implied authority to pay fees of county surveyor from public funds must be clear). In discussing the situation where a mandatory duty is involved, one of my predecessors concluded that, since a county auditor is required by law to issue warrants, his office should be charged with the cost of such issuance. 1963 Op. Att'y Gen. No. 555, p. 557. Although my predecessor did not discuss the possibility of an action in mandamus should an officer refuse to perform a duty which is required of him by law, it does not appear that (at least in situations where the officer is not clearly precluded from performance by lack of funds immediately at his disposal) failure of the person seeking such action to pay the county for the cost of the performance of such duty would present a successful defense to a mandamus action. See generally Bradley v. Shannon, 24 Ohio St. 2d 115, 265 N.E.2d 260 (1970).

On the other hand, it appears that if a county officer has the discretion to determine whether to perform a particular service, such officer may consider payment to the county as one factor in making his decision. "Where authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner." Jewett v. Valley Ry. Co., 34 Ohio St. 601, 608 (1878). It does not appear to be unreasonable for an officer to consider a possible benefit in the form of payment to the county when deciding whether to render a service which he is not required by law to render. Of course, it is possible that such a consideration would not be found reasonable if the office desiring the service had no authority to purchase it or funds at its disposal for such purpose. 1968 Op. Att'y Gen. No. 68-140, overruled by 1978 Op. Att'y Gen. No. 78-029 (prior to the authorization in R.C. 305.171 to pay county employee group medical insurance from special funds, charges against such funds for such purpose was not permitted); 1955 Op. Att'y Gen. No. 6031, p. 658 (state funds may not be used to pay county administrative expenses for certain welfare programs). Additionally, no power to charge could be implied where such implication would conflict with an express provision of law. Therefore, it would not be reasonable when billing a public office for the county commissioners to include in the charge an expense which the law requires be paid from a particular fund or budget.[2] See Longworth v. City of Cincinnati, 34 Ohio St. 101 (1877) (work performed by chief city engineer whose salary must be paid from the city's general fund may not be included in an assessment; if an additional employee must be hired for a particular improvement the cost of his service may be assessed); 1931 Op. Att'y Gen. No. 3406, vol. II, p. 938

[2]For example, the Ohio Revised Code requires that the compensation of certain county officers and their assistants be paid from the county general fund. R.C. 325.01; R.C. 309.06.

(where a statute provides that an expense be paid out of the county treasury no charge back to the state or any political subdivision in the county may be made). To charge in such an instance would be an attempt to do indirectly that which could not be done directly. 1956 Op. Att'y Gen. No. 6676, p. 453.

Based on the foregoing paragraphs, I conclude that whether any particular service is provided by an office of county government on a mandatory or discretionary basis, a board of county commissioners may not charge the public office receiving such service unless there is express statutory authorization for such charge or authority necessarily implied from an express power. As I noted above, it is impossible to consider all possible charges which might be made. I have, therefore, set forth this general rule which should be applied on a case by case basis in light of the facts before you.

Your third question asks whether the conclusion set forth above is affected by the fact that the program for which services are rendered is a federal program for which costs identified under Federal Management Circular No. 74-4 (hereafter FMC 74-4) may be reimbursed. Although boards of county commissioners may not have express statutory authority to charge for any or all county-provided services, counties clearly are authorized to participate in federal programs. R.C. 307.85. FMC 74-4 and the brochure "Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts With the Federal Government," which is to be used by state and local governments in applying FMC 74-4, describe the process of determining both direct and indirect costs applicable to federal grants and contracts with state and local governments. Pursuant to FMC 74-4, the federal government will reimburse any state or local agency for certain costs incurred in operating a federal program. Included in these costs are "[a]ll costs of a state or local department or unit performing a grant or contract. . .provided they are necessary for the efficient conduct of the grant or contract." Cost Principles, p. 1. It is also clear, however, that "[t]he costs of services provided by central service type agencies to departments or units performing federal grants or contracts are allowable regardless of whether there is an actual transfer of funds between the organizations involved." Cost Principles, p. 1. Thus, it is clearly not necessary for a board of county commissioners to charge a public office for centralized services in order for that agency to include such amounts in its request for federal reimbursement funds pursuant to FMC 74-4. If, however, it is necessary for a board of county commissioners to charge a public office for certain services in order to obtain from that office the federal reimbursement funds which are or will be due to the county, the authority to do so may be implied from R.C. 307.85 ("The board of county commissioners. . .may participate. . .in establishing and operating any federal program. . .and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state"). In such a situation, participation in the federal program would extend as far as federal reimbursement funds may be made available for the particular service billed.

Your fourth question asks whether the certificate provided for by R.C. 5705.41(D) is required where a purchase made by a public office is made from a county itself. R.C. 5705.41 provides that "[n]o subdivision or taxing unit shall. . .[m]ake any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same. . .has been lawfully appropriated. . . ." I am not aware of any Ohio law which would exempt contracts or orders involving the expenditure of money, for which a certificate is required under R.C. 5705.41(D), where the beneficiary of the contract or order is a county.[3] Therefore, in answer to your fourth question, if an office of county government possesses the authority either on a mandatory or discretionary basis to

[3]I note that where a county office has funds in its budget which may properly be used to pay a proper charge when billed, no transfer as contemplated in R.C. 5705.14, 5705.15 and 5705.16 would occur.

provide services to other public offices, if the county has either express or implied power to charge for such services, and if the office which is to receive such services is otherwise subject to requirements of R.C. 5705.41(D) with respect to the certification of availability of funds, such certificate is a prerequisite to payment.

You have also asked by what method terms of exchange are to be determined. In the absence of express provision directing the terms of exchange for any particular situation, such as in R.C. 117.15, which sets forth the costs which may be distributed among the various taxing districts of the state by the Auditor of State, terms may apparently be agreed upon by the parties involved. As I stated above, "[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner." Jewett, supra, at 608. Therefore, any terms which are reasonable may be agreed upon by the parties involved, provided that no express provision of law directs such terms.

You have also asked at what time the appropriate line-item account of the office receiving the services is to be encumbered. The language of R.C. 5705.41(D) concerning certification provides that no subdivision or taxing unit shall "[m]ake any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same. . .has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances" (emphasis added). The emphasized language of R.C. 5705.41 seems to imply that funds are encumbered at the time of certification. "Encumbrance" ("incumbrance") is defined as "a lien, charge, or claim attached to the real or personal property of another." Webster's New World Dictionary 713 (2d ed. 1978). Once it is certified that funds are available to meet a particular obligation, that obligation becomes binding upon the subdivision or taxing district. Carmichael v. Bd. of Education, 32 Ohio App. 520, 168 N.E. 392 (1929). Since the purpose of certification is to assure that funds are available for a particular purpose, funds for that purpose must be encumbered at the time they are certified as being available.

Based on the foregoing, it is my opinion, and you are hereby advised, that:

1. If a service is performed for a public office by an office of county government, whether on a mandatory or discretionary basis, a board of county commissioners may not charge the office receiving such service unless there is express statutory authorization for such charge or authority implied from an express power.

2. Pursuant to R.C. 307.85, a board of county commissioners may charge a public office for services provided by an office of county government to the extent necessary to collect federal reimbursement funds which have been specifically provided for such purpose.

3. If a board of county commissioners has the authority, either express or implied, to charge for services rendered to a public office by an office of county government and if the office receiving such services is otherwise subject to the requirements of R.C. 5705.41(D) with respect to certification of availability of funds to pay the county, such certification is a prerequisite to payment by the office receiving the services.

4. When a county office performs services for another public office and a board of county commissioners has either express or implied authority to charge for the provision of such services, in the absence of express statutory provision directing the method for determining the terms of exchange, such terms should be determined in a reasonable manner.