

February 14, 2019

The Honorable Charles S. Howland  
Morrow County Prosecuting Attorney  
60 East High Street  
Mt. Gilead, Ohio 43338

SYLLABUS:

2019-006

R.C. 339.06 authorizes a board of county hospital trustees to hire management consultants as the board determines are necessary and desirable to assist in the management of the operation of the county hospital. County hospital operating funds may be used to pay the expense of hiring such consultants. (1961 Op. Att'y Gen. No. 2188, p. 234 and 1961 Op. Att'y Gen. No. 2397, p. 387, overruled, as a result of legislative enactment.)



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OPINION NO. 2019-006

The Honorable Charles S. Howland  
Morrow County Prosecuting Attorney  
60 East High Street  
Mt. Gilead, Ohio 43338

Dear Prosecutor Howland:

By your letter of November 13, 2018, you have asked us for a formal legal opinion. You indicate that recently “the Morrow County Hospital Board of Trustees spent \$300,000.00 (approximately) on a study on how best to align the Morrow County Hospital with one of the large health care companies, in this case OhioHealth as opposed to Avita Health System, both of which operate in this region.” You write that “[i]t seems that this explicitly contravenes the legislature’s wording of O.R.C. 339.06 and the meaning of the Ohio Attorney General Opinions in 1961 OAG 2188 and 2397.” Specifically, you ask if “the Attorney General’s opinion (has) changed since 1961 to allow this practice[?]”<sup>1</sup>

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<sup>1</sup> Although you make no specific indication in this regard, it is our assumption, on the basis of your references to the “Morrow County Hospital Board of Trustees” and to Sections 339.01 to 339.14 of the Ohio Revised Code, that the Morrow County Hospital is a county hospital which was created and formed, and which functions under Chapter 339 of the Ohio Revised Code. Section 339.02 provides that a board of trustees of a county hospital

shall be created pursuant to this section after the board of county commissioners first determines by resolution to establish a county hospital. Copies of such resolution shall be certified to the probate judge of the county senior in point of service and to the judge, other than a probate judge, of the court of common pleas of the county senior in point of service. The board of county commissioners together with the probate judge of the county senior in point of service and the judge of the court of common pleas of the county senior in point of service shall, within ten days after such certification, appoint a board of county hospital trustees.

The section provides for the composition of such a board, the terms and method of appointment of its members, and other processes incident to its functions.

R.C. 339.03 provides that “[t]he board of county hospital trustees shall have complete charge of the selection and purchase or lease of a site or sites for a county hospital, taking title or leasehold interest of such site or sites in the name of the county, the selection of plans and specifications, the determination and erection of all necessary buildings on such site or sites, and of the selection and installation of all necessary and proper furniture, fixtures, and equipment.” R.C. 339.06 sets out additional powers and authority with which the board of a county hospital is imbued providing, in relevant part, that:

(A) The board of county hospital trustees, upon completion of construction or leasing and equipping of a county hospital, shall assume and continue the operation of the hospital.

(B) The board of county hospital trustees shall have the entire management and control of the county hospital....

(C) The board of county hospital trustees has control of the property of the county hospital, including management and disposal of surplus property other than real estate or an interest in real estate.

(D) With respect to the use of funds by the board of county hospital trustees and its accounting for the use of funds, all of the following apply:

(1) The board of county hospital trustees has control of all funds used in the county hospital’s operation, including moneys received from the operation of the hospital, moneys appropriated for its operation by the board of county commissioners, and moneys resulting from special levies submitted by the board of county commissioners as provided in section 5705.22 of the Revised Code.

...

(3) Annually, not later than sixty days before the end of the fiscal year used by the county hospital, the board of county hospital trustees shall submit its proposed budget for the ensuing year to the board of county commissioners for that board’s review. The board of county commissioners shall review and approve the proposed budget by the first day of the fiscal year to which the budget applies. If the board of county commissioners has not approved the budget by the first day of the fiscal year to which the budget applies, the budget is deemed to have been approved by the board on the first day of that fiscal year.

(4) The board of county hospital trustees shall not expend funds received from taxes collected pursuant to any tax levied under section 5705.22 of the Revised Code or the amount appropriated to the county hospital by the board of county commissioners in the annual appropriation measure for the county until its budget for the applicable fiscal year is approved in accordance with division (C)(3) of this section. At any time the amount received from those sources differs from the amount shown in the approved budget, the board of county commissioners may require the board of county hospital trustees to revise the county hospital budget accordingly.

(5) Funds under the control of the board of county hospital trustees may be disbursed by the board, consistent with the approved budget, for the uses and purposes of the county hospital; for the replacement of necessary equipment; for the acquisition, leasing, or construction of permanent improvements to county hospital

property; or for making a donation authorized by division (E) of this section. Each disbursement of funds shall be made on a voucher signed by signatories designated and approved by the board of county hospital trustees.

It is evident, therefore, that the board of trustees of a county hospital created pursuant to R.C. Chapter 339 enjoys significant discretion and control incident to the management and financial affairs of the county hospital.

You direct our attention, however, to two Ohio Attorney General opinions which relate to the authority of a board of trustees of a county hospital. In 1961 Op. Att’y Gen. No. 2188, p. 234, at 234 then Ohio Attorney General Mark McElroy was asked whether a board of trustees of a county hospital created under Chapter 339 is authorized by law to “contract with a professional hospital consulting firm to survey community-wide hospital facilities and needs projected over the next ten to fifteen years.” Attorney General McElroy answered that question in the negative. *Id.* at 237. The Attorney General reasoned that “the members of a board of county hospital trustees have only such powers as are expressly delegated them by statute, and such as are necessarily implied from those so delegated[.]” *Id.* at 236 (citation omitted). He noted that Sections 339.03 to 339.14 contain no such grant of specific authority, and, in his judgment, no “such authority is necessarily implied for the board to effectuate its statutory duties.” *Id.*

In 1961 Op. Att’y Gen. No. 2397, p. 387, at 388, the issue was revisited in a question which asked whether a board of trustees of a county hospital may “contract with a professional hospital consulting firm to establish a short and long range plan to meet the needs of the hospital and to determine how, for what purposes and to what extent the county hospital should be developed in the future[.]” In rendering his determination that “a board of trustees of a county hospital is without authority to contract with a private consulting firm for the furnishing of a survey on the needs and future development of the hospital[.]” the Attorney General cited 1953 Op. Att’y Gen. No. 3063, p. 462, at 464, in which it is indicated that “[c]ounties are strictly creatures of the legislature, and the county commissioners and other officers of the county have only those powers which the legislature has seen fit to grant and those which are clearly implied and essential to the carrying out of the powers granted.” 1961 Op. Att’y Gen. No. 2397, p. 387, at 390. Further reference is made in the opinion to the holding in *Gorman v. Heuck*, 41 Ohio App. 453, 458, 180 N.E. 67 (Hamilton County 1931), that:

[i]f then, there be no statutory authority permitting such expenditures out of public funds, all that is contended that is and introduced in evidence can be but strong and impelling matter for the consideration of the Legislature, but unavailing to a court limited to approval of drafts upon the treasury authorized by the statute laws of this state.

The two Ohio Attorney General opinions to which you refer were based upon the conclusion that the provisions of R.C. Chapter 339, as they had been enacted by the Ohio General Assembly and were then existent, contained no provision which specifically and explicitly imbued a board of trustees of a county hospital with the authority to contract with consultants to provide guidance and assistance

in the management of the county hospital, or any provision from which such authority could be clearly implied.

We note, however, that in 1972 the Ohio General Assembly enacted Amended Substitute Senate Bill 337 which became effective on October 16 of that year. 1971-1972 Ohio Laws 557, 559 (Am. Sub. S.B. 337, eff. Oct. 16, 1972). Senate Bill 337 amended R.C. 339.06 to provide that a board of trustees of a county hospital “may hire, by contract or as salaried employees, such management consultants ... and other professional advisors as it determines are necessary and desirable to assist in the management of the programs and operation of the county hospital” and that payment for such “professional advisors” may be made “from county hospital operating funds.” 1971-1972 Ohio Laws 557, 559 (Am. Sub. S.B. 337, eff. Oct. 16, 1972).<sup>2</sup> That provision is now found in division (J)(4) of R.C. 339.06. The amendment of R.C. 339.06 to expressly permit a board of county hospital trustees to hire management consultants necessitates the overruling of 1961 Op. Att’y Gen. No. 2188, p. 234 and 1961 Op. Att’y Gen. No. 2397, p. 387. It is our opinion, therefore, that, pursuant to R.C. 339.06(J)(4), a board of trustees of a county hospital is empowered to contract with management consultants as it determines such arrangements to be necessary and desirable to assist in the management of the programs and operation of the county hospital, and may pay the expense of such arrangements from hospital operating funds.

By its terms, R.C. 339.06 entrusts to the board of trustees of a county hospital considerable discretion to determine what consultant services are necessary and desirable to assist the management and programs of the county hospital. As is indicated in 1993 Op. Att’y Gen. No. 93-066, at 2-311 “[a] board of county hospital trustees is created pursuant to R.C. 339.02 and is given broad authority over the county hospital.” That broad authority must be exercised in a reasonable manner and for a public purpose. In *State ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 325, 96 N.E. 2d 835 (1951), the Court, quoting 37 American Jurisprudence, 734, 735, Section 120, indicated that:

“[t]he determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect.”

The *McClure* court noted that each case involving an issue of the propriety of a public expenditure must be afforded a factual determination ““in the light of existing conditions, with respect to the

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<sup>2</sup> The 1972 enactment contained a provision which indicated that “provided that in any county where the contribution from the county general revenue fund to the county hospital exceeds twenty per cent of the county hospital operating budget, the hiring of such advisors shall be subject to the approval of the board of county commissioners.” 1971-1972 Ohio Laws 557, 559 (Am. Sub. S.B. 337, eff. Oct. 16, 1972). This limitation was removed, however, in 1986 by the General Assembly’s enactment of Substitute House Bill 428, effective December 23 of that year. 1985-1986 Ohio Laws, Part II, 3748, 3751 (Sub. H.B. 428, eff. Dec. 23, 1986).

objects sought to be accomplished, the degree and manner in which that object affects the public welfare, and the nature and character of the thing to be done; but the court will give weight to a legislative determination[.]” *State ex rel. McClure v. Hagerman*, 155 Ohio St. at 325-26 (quoting 64 Corpus Juris Secundum, 334, 335, Section 1835 b). In 1982 Op. Att’y Gen. No. 82-006, at 2-19, then Attorney General William J. Brown wrote that, in spite of the language in *McClure* referencing the actions of municipal legislative bodies, there is no reason to restrict the analysis to municipalities, but it should be equally applied to counties, townships, school districts, and other political subdivisions in the context of the powers expressly granted or necessarily implied as to the respective entity.

In the performance of official duties, public officers are required to exercise reasonable discretion. *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918). The exercise of discretion by a public official will not be set aside by the courts unless it constitutes an abuse of discretion. *See State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 471, 423 N.E.2d 105 (1981) (“[o]nly where an abuse of discretion is shown either as to the nature of the information, the means of dissemination or the amount of money expended are the courts authorized to interfere with the exercise of such implied power”). When the General Assembly has conferred discretion upon a public official, “[t]he Attorney General is not authorized to provide [the official] with direction regarding the exercise of [his] discretion.” 2004 Op. Att’y Gen. No. 2004-032, at 2-294. Moreover, “[w]hen a public officer has been given the discretion to determine whether a particular public expenditure is for a purpose reasonably related to the activities and operations of an office, the Attorney General may not use the opinion-rendering function to exercise that discretion for the public officer.” 2014 Op. Att’y Gen. No. 2014-005, at 2-36 n.3. Accordingly, it is beyond the scope of an Attorney General opinion to determine whether a particular expenditure by a board of county hospital trustees constitutes an abuse of discretion. As such, we offer no opinion and make no determination as to the propriety of the contract discussed in your letter.

Based on the foregoing, it is my opinion, and you are hereby advised that R.C. 339.06 authorizes a board of county hospital trustees to hire management consultants as the board determines are necessary and desirable to assist in the management of the operation of the county hospital. County hospital operating funds may be used to pay the expense of hiring such consultants. (1961 Op. Att’y Gen. No. 2188, p. 234 and 1961 Op. Att’y Gen. No. 2397, p. 387, overruled, as a result of legislative enactment.)

Respectfully,



DAVE YOST  
Ohio Attorney General