OPINION NO. 80-030

Syllabus:

A county may provide health and medical coverage for a particular group of county employees, even though those benefits differ from the benefits procured for other county employees, where the benefits are provided through a jointly administered health and welfare trust fund in which the county and the collective bargaining representative of the employees agree to participate. (Paragraph 2 of the syllabus, 1969 Op. Att'y Gen. No. 69-049, overruled.)

To: Robert A. Jones, Clermont County Pros. Atty., Batavia, Ohio
By: William J. Brown, Attorney General, May 16, 1980

I have before me your request for an opinion concerning whether a board of county commissioners may provide and pay for additional medical and health insurance for one group of county employees where the benefits to be provided thereby will exceed the benefits provided to other county employees.

Your letter of request indicates that the Board of Commissioners of Clermont County is currently providing certain medical and health insurance benefits for all county employees, officers and their dependents. Among these county employees is a group of employees of the Clermont County Sewer and Water District, which group is represented for collective bargaining purposes by Local 2461, Council Eight, AFSCME AFL-CIO. Local 2461, as bargaining agent, wants the board to provide the bargaining unit employees with additional medical and health benefits, including dental care, eye care and hearing aids, to be provided under a separate contract between the county and the Ohio Council Eight AFSCME Health and Welfare Fund. Your request indicates that the extra benefits will be provided only to employees who are members of the union. However, the language of the proposed collective bargaining agreement indicates that in fact such benefits would inure to all permanent full-time employees of the county sewer and water district, regardless of union membership. Therefore, I have premised my opinion on the assumption that all the permanent full-time employees in the bargaining unit would be covered by the additional insurance, and express no opinion as to the legality of extending such additional benefits to union members only. It is my understanding that, in the instant case, all full-time employees of the county sewer and water district are, in fact, members of the union. Hence, the effect of providing extra benefits would be the same in this case as in the situation outlined in your letter.

Your request thus raises the question of whether a board of county commissioners is authorized by R.C. 305.171 to accord certain employees, by a separate contract between the board and a jointly administered union trust fund, insurance or health care benefits which are different from those accorded other county employees. Reference to the powers created by R.C. 305.171 is central; it is virtually axiomatic under Ohio law that boards of county commissioners are creatures of statute which may exercise only those powers expressly conferred by statute or necessarily implied from those expressly granted. See, e.g., State ex rel. Clark v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921); State ex rel. Locher v. Menning, 95 Ohio St. 97, 115 N.E. 571 (1916); Gorman v. Heuck, 41 Ohio App. 453, 180 N.E. 87 (Ct. App. Hamilton County 1931); 1979 Op. Att'y Gen. No. 79-055; 1974 Op. Att'y Gen. No. 74-065; 1974 Op. Att'y Gen. No. 74-024; 1973 Op. Att'y Gen. No. 73-103; 1973 Op. Att'y Gen. No. 73-090.

R.C. 305.171 provides in pertinent part as follows:

> (A) The board of county commissioners of any county may contract, purchase, or otherwise procure and pay all or any part of the cost of group insurance policies that may provide benefits for

> hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, or prescription drugs, and that may provide sickness and accident insurance, or group life insurance, or a combination of any of the foregoing types of insurance or coverage for county officers and employees and their immediate dependents from the funds or budgets from which said officers or employees are compensated for services, ...
>
> (B) The board also may negotiate and contract for any plan or plans of group insurance or health care services with health care corporations organized under Chapter 1738. of the Revised Code and health maintenance organizations organized under Chapter 1742. of the Revised Code, ...
>
> (C) Section 307.86 of the Revised Code does not apply to the purchase of benefits for county officers or employees under divisions (A) and (B) of this section when such benefits are provided through a jointly administered health and welfare trust fund in which the county or contracting authority and a collective bargaining representative of the county employees or contracting authority agree to participate. (Emphasis added.)

By its terms, R.C. 305.171 empowers the board of county commissioners to purchase or procure a variety of medical and health benefits. In your request for my opinion, you listed specific kinds of benefits sought to be provided to the members of Local 2461, including dental care, eye care and hearing aids. As all of these particular benefits are enumerated in R.C. 305.171 as permissible benefits, there is obvious threshold authority for their being generally provided to county employees. However, we must look at the structure and evolution of R.C. 305.171 to determine whether it also requires that uniform benefits be provided to all county employees, regardless of the fact that some are organized into bargaining units and some are not.

County boards of commissioners have been authorized to procure health and medical insurance for county employees since 1967, when the General Assembly enacted Am. Sub. H.B. 586 (1967-1968 Ohio Laws 252, eff. Nov. 24, 1967), the predecessor to the current R.C. 305.171(A). In 1969, R.C. 305.171 was amended to specify the county funds from which such insurance premiums could be paid and to include non-profit medical care corporations in the list of permissible sources for such insurance. 1969-1970 Ohio Laws 266 (Am. S.B. 112, eff. Sept. 23, 1969). With the passage of Am. Sub. H.B. 53 (1973 Ohio Laws 1157, eff. Nov. 20, 1973), the predecessor of current R.C. 305.171(B) was enacted to provide that certain health care corporations organized under R.C. Chapter 1738 or health maintenance organizations ("HMO's") organized under R.C. Chapter 1742 could provide the permissible health and medical coverage; employees were given the right to choose between a plan authorized by R.C. 305.171(A) and one established pursuant to R.C. 305.171(B). The provisions of R.C. 305.171(B) were further refined through amendment in 1976 by Am. Sub. H.B. 296 (1976 Ohio Laws 2279, eff. July 15, 1976).

Significantly, it was not until 1978 that R.C. 305.171(C) was enacted by passage of Sub. S.B. 239, 112th Gen. A. (1978) (eff. Aug. 18, 1978). As quoted above, R.C. 305.171(C) provides an exemption from the competitive bidding requirements of R.C. 307.86 where a county is providing for health and medical insurance benefits described in R.C. 305.171(A) or (B) through an agreement to participate with "a collective bargaining representative of the county employees" in "a jointly administered health and welfare trust fund." R.C. 305.171(C) thus constitutes a positive statutory codification of the premise that public employers, such as the board of county commissioners, may join with employees, or their representatives, to bargain collectively concerning the terms of such employment. Its enactment in 1978 followed closely on the heels of the Ohio Supreme Court's landmark decision in Dayton Classroom Teachers Ass'n v. Board of Education, 41 Ohio St. 2d 127, 323 N.E. 2d 714 (1975), wherein the Court held that, notwithstanding the absence of express statutory authority to do so, the defendant board of education was "vested with discretionary authority to negotiate and to enter into a collective bargaining agreement with its employees." 41 Ohio St. 2d at 132. The Supreme Court

reaffirmed its 1975 opinion in Civil Service Personnel Ass'n v. City of Akron, 48 Ohio St. 2d 25, 356 N.E. 2d 300 (1976), where it stated: "This court has recently recognized the right of public employees, under appropriate circumstances, to bargain collectively." 48 Ohio St. 2d at 28. See also 1980 Op. Att'y Gen. No. 80-007; 1979 Op. Att'y Gen. No. 79-054.

Although R.C. 305.171(C) does not obligate either the employees or the county to engage in collective bargaining concerning the provision of health benefits, it does recognize that the county may choose to bargain with representatives of county employees concerning such terms of employment. Its purpose, therefore, is to enable the county to provide such benefits pursuant to a collective bargaining agreement free of the strictures imposed by the competitive bidding provisions of R.C. 307.86. In this fashion, R.C. 305.171(C) balances the theoretical economies to be gained through competitive bidding against the tendency of the collective bargaining process to "contribute to more harmonious relations [between public employers and employees]," Dayton Classroom Teachers Association, 41 Ohio St. 2d at 133, 323 N.E. at 718. The balance was struck in favor of the latter, and the General Assembly reflected this choice by providing in R.C. 305.171(C) that health and medical benefits provided through a jointly administered (i.e., labor-management) trust fund pursuant to a collective bargaining agreement could be purchased without competitive bidding.

The legislature has, therefore, expressly approved public sector collective bargaining relative to health and medical coverage for county employees. Thus, the terms of R.C. 305.171 must be construed in a fashion which reflects the legislative intent; the furthering of the legislative intent is the ultimate goal of statutory construction, Cochrel v. Robinson, 113 Ohio St. 526, 527, 149 N.E. 871, 872 (1925). See also Humphrys v. Winous, 165 Ohio St. 45, 133 N.E. 2d 780 (1956); State v. Stouffer, 28 Ohio App. 2d 229, 276 N.E. 2d 651 (Ct. App. Franklin County 1971). Moreover, where there are arguably conflicting statutory elements, there is a coordinate obligation to harmonize those elements where such is possible and where it will give rise to a reasonable result. Humphrys v. Winous; Lucas County Commissioners v. Toledo, 28 Ohio St. 2d 214, 217, 277 N.E. 2d 193, 194 (1971). With these principles of statutory construction in mind, I turn to a consideration of whether R.C. 305.171 restricts a county to the provision of uniform coverage for all employees.

The authorization to purchase health and medical coverage provided in R.C. 305.171(A) and (B) is broadly framed. Division (A) contains an exhaustive list of permissible types of health and medical insurance and provides that such insurance may be purchased or procured from a number of types of providers. The board's power to purchase several types of insurance under several different plans is clear because of the plural language used; for example, in R.C. 305.171(A), a board is empowered to purchase and pay for all or part of the cost of "group insurance policies" (emphasis added) and in R.C. 305.171(B), a board is enabled to negotiate "for any plan or plans of group insurance or health care services" (emphasis added). R.C. 305.171 contains only three essential limitations on the discretion of the board to determine the best method for providing health and medical insurance benefits. First, it may provide such benefits only for county officers, employees and their immediate dependents. Second, the provider of the coverage must be within the statutory description, e.g., inter alia, an insurance company, a hospital service association organized under R.C. Chapter 1739 or a health care corporation organized under R.C. Chapter 1738. Finally, where the employer wishes to provide the health and medical benefits through a contract with either a health care corporation organized under R.C. Chapter 1738 or a health maintenance organization organized under R.C. Chapter 1742, the employees and officers covered thereunder must be given an opportunity to choose between that insurance program and a program which falls within the ambit of R.C. 305.171(A). The only other requirement which is imposed upon a board in determining the nature and extent of the benefits, assuming that they are identified as permissible in R.C. 305.171(A), is that expressed in R.C. 307.86 which, as mentioned hereinbefore, requires that the purchase of certain kinds of services be preceded by competitive bidding; it is this competitive bidding requirement which is waived under R.C.

305.171(C) as to benefits procured under the terms of a collective bargaining agreement.

The statute itself does not disclose any requirement that the benefits accorded thereunder be provided on a uniform basis to all employees. This principle of uniformity appears to have its genesis in the pronouncement of one of my predecessors concerning a similar question. In 1969 Op. Att'y Gen. No. 69-049, the question was raised whether, with the authorization of the board of county commissioners, the county board of mental health and retardation could enter into a contract to provide its employees with certain benefits enumerated in R.C. 305.171 where the separate policy proposed to be purchased would be issued by an insurance company other than that which was underwriting the policy covering all other county employees. The Attorney General opined that R.C. 305.171 only authorized the board of county commissioners itself to enter into such contracts; therefore, the opinion concluded, any contract to purchase benefits of the type enumerated in R.C. 305.171 had to be entered into by the board of county commissioners itself. The clear but tacit basis for the opinion was that the authority to purchase such insurance was non-delegable by the board of county commissioners.

Although my predecessor had, in essence, answered the single dispositive question, he also offered his opinion that the county commissioners themselves could only enter into such group health insurance contracts as would provide uniform coverage for all county employees. In reaching this conclusion, my predecessor relied upon the use of the word "group" in the phrase "group insurance" and found that the phrase as used in R.C. 305.171 meant "one comprehensive policy" covering "the entire number of county employees." He then stated:

> I am convinced that the legislature desired one uniform group health insurance policy for all county employees, without regard to the various health insurance policy terms which may be negotiated by the county commissioners pursuant to Section 305.171, Revised Code. This result is dictated because of the possible iniquities [inequities?] which would arise with respect to different groups of county employees if several policies were purchased. Also, if more than one policy were contracted for by the county commissioners, there would be increased premium cost per person as each policy would encompass fewer people.

Op. No. 69-049 at 2-106 (emphasis added).

As noted hereinabove, R.C. 305.171 was enacted in 1967; therefore, Op. No. 69-049 considered the statute as it existed prior to its first amendment by the legislature in September of 1969. It is thus instructive to consider the continued validity of the holding of Op. No. 69-049 in light of the substantial changes wrought upon R.C. 305.171 by the legislature. In its original form, R.C. 305.171 stated as follows:

> The board of county commissioners of any county may procure and pay all or any part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for county officers and employees and their immediate dependents, whether issued by an insurance company or a hospital service association duly authorized to do business in this state.

A comparison of R.C. 305.171 as it was originally enacted and the statute as it exists today discloses several striking differences. First, and most importantly, where the original enactment empowered the board of county commissioners to procure "group hospitalization. . . insurance" (emphasis added) leading my predecessor to conclude that "one uniform. . . policy" was required, the statute in its current form enables the board to purchase "group insurance policies" (emphasis added). Clearly, the latter language anticipates that more than one policy might be

purchased by the board in its attempt to meet the health care needs of county employees. Similarly, while the earlier statute made no provision for the board's entry into a contract to provide health care though use of alternative health care delivery modalities, such as health maintenance organizations organized under R.C. Chapter 1742, the current statute clearly allows the board to do so. Moreover, the language of R.C. 305.171(B) in fact requires that the board provide the option of traditional health insurance under R.C. 305.171(A) if it wishes to also provide for the alternative and less traditional health care services described in R.C. 305.171(B). This conclusion clearly obtains from the language in R.C. 305.171(B) which requires the board to offer all employees and officers who elect to participate in the alternative program an opportunity to change that election at least once each year, R.C. 305.171(B)(1) and (2), which election is meaningful only if there is a program already established under R.C. 305.171(A). Thus, the legislature itself has posited a situation where the board would not only be contracting for more than one group insurance policy at one time, but is actually paying part or all of the cost of two separate programs. Yet, there is no statutory requirement that the provisions of the two separate programs be identical. Indeed, it is highly conceivable and even quite likely that an HMO, for instance, could be offering a far broader range of health benefits (e.g., visits to physicians' offices) than would be provided under the traditional commercial health insurance coverage.

Clearly, the current statutory scheme vests in the county significantly more discretion than did R.C. 305.171 when construed in Op. No. 69-049. The concept of a single all-encompassing group of county employees insured under a single policy as contemplated by Op. No. 69-049 can no longer obtain in the face of statutory language which clearly contemplates multiple insurance policies and multiple health care delivery options. But there is yet another, and even more compelling, reason for rejecting the "uniform benefits for all" concept in the context of public sector bargaining.

The "uniformity" concept expressed in Op. No. 69-049 simply cannot be reconciled with the structure and realities of the collective bargaining process which is recognized in R.C. 305.171(C). The organizational building block in labor relations is known as the "bargaining unit." Generally speaking, a bargaining unit consists of a homogeneous, distinct, and identifiable group of employees having a community of interest with one another in the terms and conditions of their employment. See, e.g., Re: Metropolitan Life Insurance Co., 156 NLRB 1408 (1966). Traditionally, unions do not organize commingled groups of employees whose job functions, working conditions, geographic locations, hours, and supervisors vary widely. By way of example, trash collectors in a county sanitation department have little in common with draftsmen in the county engineer's office. Due perhaps to both the historic concept of an "appropriate" bargaining unit under federal labor law, see 29 U.S.C. §159(b), and dictates of common sense, unions tend to organize homogeneous groups into separate and distinct bargaining units. More often than not, this will result in some county departments being organized and others not being organized. To say that health benefits for all county employees must be uniform is to say that before a union may negotiate a contract providing for a jointly-trusteed health and welfare plan, it must organize all county employees into one bargaining unit. That simply flies in the face of the realities of the collective bargaining process—a process specifically recognized and legitimized by R.C. 305.171(C). In actuality, the labor relations world is comprised not of monolithic bargaining units but of multiple units, each composed of a discrete and homogeneous group of employees. I cannot assume that the legislature was ignorant of the real world situation to which R.C. 305.171(C) would be applied.

Does R.C. 305.171(C) contemplate a multiplicity of bargaining units? It certainly seems to. The statute indicates that the collective bargaining agreement which contains a provision for a jointly administered health and welfare trust fund is to be entered into by "the county or contracting authority and a collective bargaining representative of the county employees" (emphasis added). If the legislature had contemplated a single bargaining unit composed of all organized county employees, it could certainly have limited the reference in R.C. 305.171(C) to "the county" (or the county commissioners). By referring to a collective

bargaining agreement executed by a county "contracting authority," the General Assembly seems to be referring to the various county officers (i.e., auditor, recorder, treasurer, engineer, sheriff, clerk of courts, etc.) who employ and fix the compensation of county employees under the provisions of R.C. 325.17. See Op. No. 80-007 (holding that such county officers may negotiate collective bargaining agreements). When one considers the multiple insurance policies, multiple forms of health care delivery, and multiple bargaining units envisioned by R.C. 305.171, it is simply impossible to suppose that the General Assembly intended "one uniform group. . . policy for all county employees."

Similarly, my predecessor's reasoning concerning uniformity as necessary to prevent "inequitable" treatment of county employees is no longer valid. This is because the Ohio Supreme Court, in State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E. 2d 692 (1976), held that fringe benefits such as health insurance comprise a part of "compensation" as integral as a weekly paycheck. As a result, the power of government entities to fix the compensation of employees appointed by them includes a corollary power to fix fringe benefits, see, e.g., 1979 Op. Att'y Gen. No. 79-064; 1977 Op. Att'y Gen. No. 77-066; 1976 Op. Att'y Gen. No. 76-078; 1975 Op. Att'y Gen. No. 75-084. In light of the holding in Parsons that health insurance can be characterized as an appropriate fringe benefit, and assuming arguendo that the board of county commissioners is the appointing authority for employees of the county sewer and water district, with a statutory power to fix the compensation of those employees, the conclusion obtains that the board is entitled to provide those employees with fringe benefits, which may include health insurance. See Op. No. 80-007; Op. No. 79-064; 1978 Op. Att'y Gen. No. 78-029; Op. No. 75-084.

Standing alone, this authority is an arguably sufficient basis for opining that a board of county commissioners may agree to provide health insurance benefits to employees of the county sewer and water district which differ in degree or kind from those provided to other county employees. However, my opinion as expressed herein need not rely on the implied power to fix fringe benefits as a part of compensation. The immediate relevance of the doctrine expressed in Parsons to the question raised herein is that it acknowledges that the particular entity possessing the power to fix compensation may also fix fringe benefits. A fortiori, as employees of any given county may in fact be appointed by different appointing authorities, each of which may provide different fringe benefits as a part of compensation, Parsons implicitly acknowledges that there may be some variation in the fringe benefits provided to those employees. See Op. No. 78-029 (where the executive director of a county mental health and mental retardation board so authorizes, a board of county commissioners must pay premiums for certain health insurance procured for employees of that particular board, notwithstanding that similar benefits are not provided for other employees of the county).

I am not unmindful of the fact that the opinion of my predecessor expressed in Op. No. 69-049 was clarified and limited by Op. No. 79-064. However, the latter opinion carefully limited its effect by announcing that a county board of mental retardation, which has the power to fix the compensation of its employees, could, by virtue of that power, procure health insurance for its employees. Op. No. 79-064 very specifically noted the continued validity of Op. No. 69-049 insofar as it stood for the proposition that any purchases of such insurance made pursuant only to the statutory authority expressed in R.C. 305.171 could be made only by the board of county commissioners itself. However, I cannot subscribe to the continued validity of Op. No. 69-049 to the extent that it holds, in paragraph two of the syllabus, that county commissioners may enter into only a single uniform group health insurance policy which covers all county employees in all departments. The significant changes made by the legislature in R.C. 305.171, when considered in tandem with the case law and the opinions of this office which hold that appointing authorities are empowered to fix fringe benefits as a part of compensation, mandate the conclusion that the time has come to formally abandon the concept of uniformity as expressed in Op. No. 69-049. Accordingly, paragraph two of the syllabus therein is hereby overruled.

Therefore, it is my opinion, and you are advised, that a county may provide health and medical coverage for a particular group of county employees, even though those benefits differ from the benefits procured for other county employees, where the benefits are provided through a jointly administered health and welfare trust fund in which the county and the collective bargaining representative of the employees agree to participate. (Paragraph 2 of the syllabus, 1969 Op. Att'y Gen. No. 69-049, overruled.)