## OPINION 12

## OFFICIAL OPINION NO. 12

August 18, 1975

Mr. Kenneth R. Beesley
State Examiner
Indiana State Board of Accounts
Room 912 State Office Building
Indianapolis, Indiana 46204

Dear Mr. Beesley:

This is in response to your request for my official opinion in answer to the following questions:

"1. Pursuant to Public Law 62, enacted by the 1974 Indiana General Assembly, are counties, townships, towns, or cities permitted to contract with a not-for-profit corporation for health and community services *other* than those services these local units of government are specifically authorized to provide by statutes of the State of Indiana?

"2. Pursuant to Public Law 62, 1974, rather than contracting for health and community *services,* are counties, townships, towns or cities permitted to:

a. make *grants-in-aid* to a not-for-profit corporation for the purpose of defraying operating costs of such agency?

b. make grants of assistance to a not-for-profit corporation for capital expenditures, such as purchase of land and/or buildings, equipment, and remodeling costs?

"3. Assuming health and community services may be provided under a contractual agreement pursuant to Public Law 62, 1974, are counties, townships, towns or cities permitted to make contractual payments *prior* to receiving such services set forth in the contractual agreement?

"4. Does the reference 'not-for-profit corporations' contained in Public Law 62, 1974, refer to not-for-profit corporations organized pursuant to the Indiana General Not-For-Profit Act of 1935, as amended, or the Indiana General Not-For-Profit Act of 1971, as amended?

"5. Would the answer to question No. 1, No. 2, or No. 3 be altered if the funds from which such contractual payments are to be made were provided pursuant to Title I, State and Local Assistance Act of 1972, Public Law 92-512, enacted by the 92nd Congress of the United States of America?

"6. Would the answer to question No. 1, No. 2, or No. 3 be altered if the funds from which contractual payments are to be made were received pursuant to either a Prime Sponsor agreement with the United States Department of Labor or a Subagent agreement with the Indiana Office of Manpower Development for the purpose of carrying out a manpower program under terms of the Comprehensive Employment and Training Act of 1973, Public Law 93-203, and amended by the Emergency Jobs and Unemployment Assistance Act of 1974, Public Law 93-567, both of which were enacted by the 93rd Congress of the United States of America?

## ANALYSIS

Public Law 62 of Acts 1974 amends four parts of Indiana law to permit counties (Indiana Code of 1971, Section 17-1-14-11), townships (Code Section 17-4-28-6), cities (Code Section 18-1-1.5-7), and towns (Code Section 18-3-1-22.5) "to execute contracts with not-for-profit corporations to provide health and community services including visiting nurses' services, not specifically provided by a governmental agency or department."

You first ask whether Public Law 62 permits counties, townships, cities, or towns to contract with a not-for-profit corporation to provide health and community services other than those services which the respective governmental units already are authorized by statute to provide.

It is well-settled law in Indiana that a political subdivision of the state has only those powers expressly granted by the legislature, those powers necessarily or fairly implied in or incident to the powers expressly granted, and those powers indispensable to the declared purposes of the governmental unit. See e.g. *Pittsburgh, Cleveland, & St. Louis Railway v. Town of Crown Point* (1896), 146 Ind. 421, 45 N.E. 587; *Board of County Commissioners v. Sanders* (1940), 218 Ind. 43, 30 N.E. 2d 713. This principle of law was followed in 1973 O.A.G. No. 5, p. 16, where the question presented was whether revenue sharing funds may be appropriated to not-for-profit corporations to be used in programs for the aging and aged. I concluded there that, in the absence of specific statutory authority, a county may not appropriate revenue sharing funds to a not-for-profit corporation for use in such programs. Obviously the General Assembly subsequently enacted Public Law 62 to provide the statutory authority previously lacking.

Thus, the purpose of Public Law 62 was to grant to local governmental units the authority to contract with not-for-profit corporations. But that law does not purport to extend to local governmental units authority to perform additional functions beyond the scope of their statutory duties. The extension of authority relates only to the *manner* by which the governmental unit may choose to perform a specific function. To provide services, then, pursuant to Public Law 62, an appropriation is authorized only if (1) the governmental unit already is authorized to provide the *specific* service in question; (2) the governmental unit, even though it is authorized to provide the service, does not itself provide that service; and (3) the specific service falls under the general area of health and community services.

With respect to the applicability of Public Law 62 to cities, an additional factor is present and should be considered. In

addition to the powers specifically enumerated and granted to cities, Code Section 18-1-1.5-16, the so-called "home rule" provision, authorizes a city to:

> "exercise any power or perform any function necessary in the public interest in the conduct of its municipal or internal affairs, which is not prohibited by the Constitution of this state or the Constitution of the United States, and which is not by express provision denied by law or by express provision vested by any other law in a county, township or the state, special taxing district or separate municipal or school corporation."

However, even under that grant of authority, a city is authorized to exercise only those powers "necessary in the public interest in the conduct of its municipal or internal affairs." An appropriation by a city for services pursuant to Public Law 62 accordingly would be limited, by Public Law 62, to the general areas of health and community services, and, by Code Section 18-1-1.5-16, to functions necessary in the public interest in the conduct of its *municipal* or *internal* affairs. And, as noted above, the services must be those which the city itself is permitted to provide but for reasons of its own is not providing.

Public Law 62 is not a mechanism to permit governmental units to perform functions which they were not authorized to perform prior to its enactment. Rather, it permits them to accomplish things which they are authorized to do themselves but which they desire to have done by the private sector.

Your second question is whether Public Law 62 permits governmental units to make grants-in-aid or grants of assistance to a not-for-profit corporation either for operating costs or for capital expenditures. Plainly, it does not. The language of the statute must be construed in its plain, ordinary meaning. If a governmental unit expends funds under Public Law 62, it must receive services in return, and it must have a contract under which it can enforce the performance of those services. To do otherwise would destroy safeguards against waste and corruption.

Your third question asks whether payments for the contractual services provided under Public Law 62 may be made prior to receiving those services. Indiana Law forbids that. Indiana Code of 1971, Section 5-11-10-1 provides, in part, the following:

> "No warrant or check shall be drawn by a disbursing officer of the state or any of its *political subdivisions* (other than the disbursing officers of the state universities) in payment of any claim unless the same has been fully itemized and its correctness properly certified to by the claimant, or some authorized person in his behalf and filed and allowed as now provided by law." (Emphasis supplied.)

Thus, although the appropriating body may have acted and authorized an expenditure for services, *the disbursing officer may not expend that amount until after the services have been rendered and the provider of those services has submitted a claim showing that the amount is legally due.*

Your fourth question seeks a definition of "not-for-profit corporation" as used in Public Law 62. There is nothing in Public Law 62 to indicate that any special meaning should be given to that term. Under Indiana corporation law, a "not-for-profit corporation" is a corporation organized as a legal entity "which does not engage in any activities for the profit of its members and which is organized and conducts its affairs for purposes other than the pecuniary gain of its members." Code Section 23-7-1.1-2(d). The legislature thus intended by enacting Public Law 62 to restrict local governmental contracts for services to separate, not-for-profit corporate entities as opposed to individuals or informally organized groups. The "not-for-profit corporation" may be an Indiana corporation organized under either the 1971 Not-For-Profit Corporation Act (Code Section 23-7-1.1-1 to 23-7-1.1-66) or the 1935 Not-For-Profit Act (the rights under which the 1971 law expressly saves [Acts 1971, Public Law 364, § 2]) or it may be a foreign not-for-profit corporation qualified to do business under Code Section 23-7-1.1-48, *et seq.*

You ask, finally, whether the answers to the prior questions similarly apply where the sources of the funds involved are two particular programs of the federal government, namely, revenue sharing and comprehensive employment.

With respect to revenue sharing funds, the same standards applicable to the expenditure of state funds clearly apply. As stated in 1973 Opinion 5, *supra,* a local governmental unit may provide for the expenditure of revenue sharing funds only in accordance with the laws and procedures applicable to the expenditure of its own revenue. 31 U.S.C. § 1243(a)(4).

With respect to comprehensive employment funds (that is, funds received under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. §§ 801 *et seq.* as amended by Emergency Jobs and Unemployment Assistance Act of 1974, 29 U.S.C. §§ 962-966), even though Congress has not similarly included an express provision requiring expenditure of funds by a state or local governmental unit only in accordance with the laws and procedures applicable to the expenditure of its own revenues, state laws respecting monetary accountability *must* be followed by state and local agencies.

The express provision in the revenue sharing law, by which Congress provides funds to state and local governments with no apparent federal strings attached, emphasizes the local control aspect of federal revenue sharing. Because CETA is an attempt to solve what Congress says are national problems, the same apparent "no-strings" approach of revenue sharing is not present. The fact that Congress did not include a similar provision in CETA, however, should not be construed to authorize by-passing state fiscal procedures. Congress has no right to authorize the breaking of state laws respecting monetary accountability. Neither should Indiana Code Section 5-19-1-1, *et seq.,* which authorizes state and local governmental units to accept federal aid and participate in this kind of federal program under which substantial conditions are imposed, be mis-construed to authorize by-passing state fiscal procedures. The money can be spent only in a manner authorized by state law, in arrears, and only after

a claim indicating that services have been performed has been approved by the proper public officials.

## CONCLUSION

It is my Official Opinion that Public Law 62 of Acts 1974, does *not* grant to local governmental units authority to contract out for the performance of services or functions beyond their statutory powers. Rather it does permit them, in the general areas of health and community services, to exercise powers they already possess by using the services of private, not-for-profit corporations.

With respect to your second question, contracts between governmental units and not-for-profit corporations entered into pursuant to Public Law 62 must be for the purpose of obtaining specific services.

With respect to your third question, services must be paid for only *after* they have been rendered. This is the law as well as public policy of the State of Indiana.

With respect to your fourth question, services must be provided by a bona-fide, not-for-profit corporation, and not by any other kind of association, group, or individual.

With respect to your fifth question, since federal law requires that revenue sharing funds be spent in accordance with proper state accounting procedures, the use of revenue sharing funds by a local governmental unit to provide services by means of a not-for-profit corporation is subject to the provisions of Public Law 62 as noted above.

With respect to your sixth question, federal law requires that comprehensive employment funds, unlike revenue sharing funds, are to be spent for specific purposes. However, the manner in which these funds are spent is governed by state, as well as federal, statutes, including Public Law 62.