

August 10, 2012

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44871-2636

SYLLABUS:

2012-024

1. A mid-term change in the number of dollars expended by a township on a township officer's health insurance coverage is not prohibited by Ohio Const. art. II, § 20 so long as such change is not due to a mid-term legislative change to the formula for calculating the officer's compensation.
2. Article II, Section 20 of the Ohio Constitution does not prohibit a township officer who receives health insurance benefits at the commencement of his term of office from electing to discontinue receipt of those benefits mid-term. (2005 Op. Att'y Gen. No. 2005-031, syllabus, paragraph 3, approved and followed.)



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2012-024

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
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Dear Prosecutor Baxter:

You have requested an opinion concerning the applicability of Ohio Const. art. II, § 20, which imposes certain limitations upon in-term changes in the compensation of public officers, to a township's funding of a health savings account (HSA) accompanying a high deductible group health insurance plan for the township's officers. Specifically, you ask:

1. Does an in-term increase in the deductible of an HSA change the benefit or compensation to an elected official such that it constitutes a prohibited in-term increase or decrease in compensation?
2. Does the fact that no resolution or legislative action is required outside of a standing resolution requiring elected officials and employees to participate in a high deductible, fully funded HSA Plan remove the insurance company mandated change in the amount of deductible from the constitutional prohibition against in-term increases or decreases?
3. May elected officials "waive" constitutional in-term increases or decreases, for example, by an elected official signing a waiver of their right to not have a decrease in a deductible or HSA funding amount?
4. Under what circumstances in the rapidly changing nature of health insurance costs and plans may a political subdivision alter pre-existing plans in-term, without violating the constitutional prohibition?

Authority of Board of Township Trustees to Provide Health Care Benefits

The powers and duties of boards of township trustees are set forth primarily in R.C. Title 5. We begin with the principle that, in order to perform the duties imposed upon them, township trustees

may exercise only those powers conferred by statute or implied by those expressly granted.¹ *In re Vill. of Holiday City*, 70 Ohio St. 3d 365, 369, 639 N.E.2d 42 (1994) (recognizing the “well-settled principle that township trustees can exercise only those powers granted by the General Assembly”); *Trs. of New London Twp. v. Miner*, 26 Ohio St. 452, 456 (1875); *Hopple v. Trs. of Brown Twp.*, 13 Ohio St. 311, 324-25 (1862); *see also State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916) (“[t]he [statutory] authority [of a statutorily created board] to act in financial transactions must be clear and distinctly granted”); 1988 Op. Att’y Gen. No. 88-088 (syllabus, paragraph 4) (“[a] board of township trustees may disburse township funds only by clear authority of law”). In sum, township officers may not exercise a power or undertake an activity, particularly with regard to township finances, absent express or implied statutory authority to do so. 2009 Op. Att’y Gen. No. 2009-034, at 2-236.

A board of township trustees is authorized to provide health care insurance coverage to its officers and employees pursuant to R.C. 505.60. R.C. 9.833(B)(2) extends this authority, permitting political subdivisions, including townships, that provide health care benefits for their officers or employees to:

[e]stablish and maintain a health savings account program whereby employees or officers may establish and maintain health savings accounts in accordance with section 223 of the Internal Revenue Code. Public moneys may be used to pay for or fund federally qualified high deductible health plans that are linked to health savings accounts or to make contributions to health savings accounts.

Thus, a township is authorized to establish and fund the arrangement you have described, wherein township officers participate in a high deductible group health insurance plan with an accompanying health savings account.² Through the enactment of R.C. 505.60 and R.C. 9.833(B)(2), the General

¹ R.C. Chapter 504 authorizes townships to adopt a limited home rule government. Because there are no townships in Erie County that have adopted the limited home rule government, this opinion does not consider the powers of the elected officers of townships that have adopted a limited home rule government. *See, e.g., R.C. 504.04*; 2007 Op. Att’y Gen. No. 2007-036, at 2-373 nn.9-10.

² A high deductible health plan is a health plan:

- (i) which has an annual deductible which is not less than—
 - (I) \$ 1,000 for self-only coverage, and
 - (II) twice the dollar amount in subclause (I) for family coverage, and
- (ii) the sum of the annual deductible and the other annual out-of-pocket expenses required to be paid under the plan (other than for premiums) for covered benefits does not exceed—
 - (I) \$ 5,000 for self-only coverage, and
 - (II) twice the dollar amount in subclause (I) for family coverage.

Assembly has authorized boards of township trustees, in accordance with the terms of those statutes, to fix the health care benefit component of the compensation of township officers.

Article II, Section 20 of the Ohio Constitution and Health Insurance Benefits

Article II, Section 20 of the Ohio Constitution declares that, “[t]he general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.” “This constitutional provision thus ‘prohibits any change, whether an increase or decrease, in an officer’s salary during his term.’” 1993 Op. Att’y Gen. No. 93-045, at 2-223 (quoting 1992 Op. Att’y Gen. No. 92-031, at 2-120); *accord* 2011 Op. Att’y Gen. No. 2011-015, at 2-141. “Ohio Const. art. II, § 20 applies to compensation increases [or decreases] approved by subordinate bodies to whom the General Assembly has delegated the authority to fix compensation.” 2000 Op. Att’y Gen. No. 2000-043, at 2-261.

It is well established that the cost of health insurance is a part of the compensation of a public officer. *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692 (1976) (“[f]ringe benefits, such as [payments for group medical and hospital plans for county officers and employees], are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check”); *Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969) (syllabus, paragraph 1) (“[a]s to each county employee receiving the right to the benefits of a group health insurance plan procured by a board of county commissioners ... that part of the premium which is paid from public funds is a part of the cost of the public service performed by each such employee”). *See generally* 2005 Op. Att’y Gen. No. 2005-031, at 2-320 to 2-321. Furthermore, when considering the application of Article II, Section 20 of the Ohio Constitution, the terms “compensation” and “salary” have been considered synonymous. *State ex rel. Artmayer v. Bd. of Trs.*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975). Thus, we turn to a consideration of what constitutes a *change* in compensation or salary for purposes of the constitutional prohibition on in-term increases or decreases in the compensation of a public officer.

2005 Op. Att’y Gen. No. 2005-046 and 2005 Op. Att’y Gen. No. 2005-031 address questions similar to yours, and both opinions begin by explaining the various approaches the courts have taken in considering whether changes in an officer’s salary or compensation are prohibited by Ohio Const. art. II, § 20:

In *State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975), the court described the test for determining whether an in-term change in

26 U.S.C.A. § 223(c)(2)(A). “The term ‘health savings account’ [(HSA)] means a trust created or organized in the United States as a health savings account exclusively for the purpose of paying the qualified medical expenses of the account beneficiary.” 26 U.S.C.A. § 223(d)(1). *See also* 2007 Op. Att’y Gen. No. 2007-032, at 2-332 to 2-334.

compensation prohibited by Ohio Const. art. II, § 20 had occurred as whether the number of public dollars paid on behalf of the officer had changed. Following the *Artmayer* case, the court in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976), held that a county's payments for its officers' health insurance premiums are part of the officers' compensation for purposes of Ohio Const. art. II, § 20, and so a county that had not previously provided its officers health care benefits could not begin to pay for such benefits on behalf of such officers mid-term. Finally, in *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983), the court refined the analysis for those situations in which an officer's compensation had been established at the commencement of his term pursuant to a formula. As concluded by the *Schultz* court:

When a statute setting forth the formula for the compensation of an officer is effective before the commencement of the officer's term, any salary increase which results from a change in one of the factors used by the statute to calculate the compensation is payable to the officer. Such increase is not in conflict with Section 20, Article II of the Constitution when paid to the office while in term.

Section 20, Article II of the Constitution forbids the granting of in-term salary increases to officers when such changes are the result of *direct legislative action* on the section(s) of the Revised Code which are the basis of the officers' salaries.

6 Ohio St. 3d at 135 (emphasis added).

2005 Op. Att'y Gen. No. 2005-046, at 2-497 (footnote omitted); *see* 2005 Op. Att'y Gen. No. 2005-031, at 2-319 to 2-324.

We now turn to your specific questions in order to apply these principles. We will consider your first and second questions together. You explain in your letter that the HSA is used by political subdivisions as a

vehicle to control costs by offering higher deductibles to employees and elected officials. Sometimes the HSA is a sole stand-alone plan. Other times, the political subdivision offers it under a menu or choice of plans. Apparently, the employee pays a high deductible, sometimes several thousand dollars, receives an amount similar to or less than the deductible from the political subdivision which goes into a portable [HSA] to aid the employee or elected official in meeting the deductible. Once the deductible is met by the employee, then the health insurance company or self-insured subdivision pays generally a higher proportion of the employee or elected officials' medical bills (up to 100%).... The benefit to employees and elected officials is that unused money in the HSA remains the property of the person and can be used in subsequent years, accumulate year to year, is portable and passes presumably upon death to heirs.

You further explain that a township with a \$4,000 deductible in place under a high deductible health plan was notified by the insurance carrier that it no longer offered that amount as a deductible. The township was forced to choose between a higher or lower deductible, and the township trustees were unable to find a \$4,000 deductible policy elsewhere. Ultimately, the township chose a higher deductible and continued its practice of fully funding the HSA with the deductible amount. You state that the township has a “standing resolution requiring elected officials and employees to participate in a high deductible, fully funded HSA Plan,” and you ask whether the existence of such a resolution makes allowable a change in the deductible amount despite the constitutional prohibition on in-term changes in compensation. In other words, you wish to know whether, given the fact the township has a resolution requiring participation in a fully funded high deductible plan with no dollar amount specified, the township changed the compensation to its officers such that it violated the constitutional prohibition by choosing a plan with a different deductible amount to replace the plan that is no longer available. Prior Attorney General opinions have set forth the test to be applied to answer this question.

[T]he test for determining whether a prohibited in-term change in compensation has occurred is whether there has been a change in the number of public dollars expended on behalf of a public officer during the officer’s term, with the exception that, in those situations in which a public officer’s compensation or a component thereof was fixed at the commencement of the officer’s term pursuant to a formula, a change in compensation that occurs as a result of a non-legislative change in one of the external factors used in that formula is not prohibited by Ohio Const. art. II, § 20.

2005 Op. Att’y Gen. No. 2005-046, at 2-498 (footnotes omitted). *Accord* 2011 Op. Att’y Gen. No. 2011-015, at 2-142; 2005 Op. Att’y Gen. No. 2005-031, at 2-323 to 2-324. In the situation you have described, there has been a change in the number of public dollars expended on behalf of the township officers. With the new insurance policy, the township spends an additional one thousand dollars on each officer in order to fully fund the officers’ HSAs with the new deductible amount. Thus, we must determine (1) whether the township officers’ health care benefit portion of compensation was fixed at the beginning of their terms pursuant to a formula, and (2) if so, whether the current increase in the dollar amount expended for each officer has occurred as a result of a non-legislative change in one of the external factors used in such formula.

These determinations are factual and cannot be resolved by means of an opinion of the Attorney General. 1993 Op. Att’y Gen. No. 93-033 (syllabus, paragraph 1) (a question of fact “cannot be determined by means of an Attorney General opinion”); 1987 Op. Att’y Gen. No. 87-082 (syllabus, paragraph 3) (“R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion”). However, we are able to offer you guidance for how to make these factual determinations. 2005 Op. Att’y Gen. No. 2005-031 addressed a similar situation:

Your third question asks us to assume that the county’s change in the health insurance plans it will offer county personnel results from the county commissioners’ election not to continue to offer that plan. Whether an officer’s mid-term change to another insurance plan that may have different types or amount of benefits than the plan he chose at the commencement of his term is a prohibited change in

compensation depends upon whether the change in insurance plans constitutes a change in the “formula” or options that were available to the officer at the commencement of his term of office. For example, if the original formula for county health care benefits listed specific plans, levels of coverage, or other aspects of its insurance coverage under R.C. 305.171, the county commissioners’ change in any of those specifics works a legislative change upon the formula. If, on the other hand, specific insurance plans, levels of coverage, or other aspects of health insurance coverage were not identified in the original formula pursuant to which health care benefits were offered to the officer at the commencement of his term, then Ohio Const. art. II, § 20 does not prevent the county from applying such changes to an officer mid-term.

Your fourth question asks us to assume the same facts as in question three, except that the county’s failure to offer the health insurance plan chosen by an officer at the commencement of his term results from the fact that the policy is no longer available to the county. In such a situation, regardless of the specificity of the original insurance benefit formula offered by the county at the commencement of the officer’s term, the unavailability mid-term of the original plan selected by the officer is not attributable to a mid-term change in the formula by the county commissioners. So long as other health insurance plans that were available at the commencement of the officer’s term remain available, the officer may choose from among those other plans, regardless of the differences from his originally selected insurance plan, and any changes in the benefits received by the officer or the premium paid on his behalf do not violate Ohio Const. art. II, § 20.

2005 Op. Att’y Gen. No. 2005-031, at 2-331. As the foregoing analysis makes clear, a mid-term change in the dollar amount expended for each township officer’s health insurance coverage does not alone constitute a prohibited change in compensation. The change is permissible as long as it is not the result of direct legislative action by the township trustees. If the change occurs as a result of some external factor affecting the formula by which an officer’s compensation is determined, the change does not violate the constitutional prohibition on in-term changes in compensation. *See* 2005 Op. Att’y Gen. No. 2005-046, at 2-498 n.3 (“the focus of such an inquiry is upon a change in the number of county dollars spent on the officer’s behalf for such benefits, and whether such change results from a direct legislative change to the terms upon which the county made such benefits available to the officer at the commencement of the officer’s term” (citations omitted)).

In the situation addressed by 2005 Op. Att’y Gen. No. 2005-031, the Attorney General first advised that if *specific* insurance plans, levels of coverage, or other aspects of health insurance coverage were not identified in the original formula pursuant to which health care benefits were offered to the officer at the commencement of his term, then Ohio Const. art. II, § 20 does not prevent

the county from applying such changes to an officer mid-term.³ Thus, if the original formula simply states that officers shall participate in a high deductible group health insurance plan with an accompanying fully funded HSA, without specifying the amount of the fully funded deductible, then a mid-term change in the deductible is permissible. In sum, a mid-term change in the number of dollars expended by a township on a township officer's health insurance coverage is not prohibited by Ohio Const. art. II, § 20 so long as such change is not due to a mid-term legislative change to the formula for calculating the officer's compensation.

Waiver of Constitutional Protections and Prohibitions and Insurance Benefits

In your third question, you ask whether elected officials may “‘waive’ constitutional in-term increases or decreases, for example, by an elected official signing a waiver of their right to not have a decrease in a deductible or HSA funding amount.” Public officials are bound to carry out the obligations imposed by the Ohio Constitution and freely enjoy the privileges and rights the Ohio Constitution bestows. They and all citizens of Ohio must abide by its freedoms and prohibitions. *See generally Hoffrichter v. Ohio*, 102 Ohio St. 65, 67-68, 130 N.E. 157 (1921) (“[t]he term ‘law’ is clearly broad enough to comprehend constitutional law as well as statute law, and surely any given act prohibited by the constitution is unlawful, as much so at least as the same act when prohibited by statute. It would be a super-refinement of distinction to say that the sovereign people, as the principal in government, could not make an act as unlawful as their agents, the legislature”); 1991 Op. Att’y Gen. No. 91-059, at 2-290. However, a public official nonetheless is permitted to waive a benefit that is provided by his public employer.

2005 Op. Att’y Gen. No. 2005-031, at 2-330, considered whether Ohio Const. art. II, § 20 is violated when “a county officer, who, at the commencement of his term of office, was covered by a particular health insurance plan and paid a fixed percentage of the premium for such insurance coverage, voluntarily terminates his health insurance benefits during that term”:

As set forth above, the activity at which the prohibition of Ohio Const. art. II, § 20 is aimed is direct legislative adjustment of the formula used in calculating the compensation of an officer. Thus, if a county officer voluntarily elects to discontinue receiving health care insurance from the county as part of his compensation, the decrease in the officer's compensation results not from any action of the General Assembly or of the county commissioners with respect to providing health insurance. As stated in *State ex rel. Hess v. City of Akron*: “The occupant of a public office may waive part of the established salary thereof,” and “[s]uch a waiver is not contrary to public policy.”

³ When a health insurance plan becomes unavailable to a political subdivision, an officer may choose from other health insurance plans that were available at the commencement of the officer's term. In the situation you ask about, the township previously had eliminated other available health insurance plans because all the township officers had elected to participate in the high deductible group health insurance plan with an accompanying HSA.

2005 Op. Att’y Gen. No. 2005-031, at 2-330 (citations omitted). Because a township’s payment of an officer’s health insurance benefits is a form of compensation, as is a township’s payment of an officer’s salary, an officer may elect to waive the township’s payment for such benefits, and such waiver is not contrary to public policy. *See* 2005 Op. Att’y Gen. 2005-031, at 2-330; *see, e.g.*, 2003 Op. Att’y Gen. No. 2003-027 (syllabus, paragraph 1) (“an elected county official or a member of a board of elections may voluntarily waive a portion of the compensation that he is statutorily entitled to receive”); 1980 Op. Att’y Gen. No. 80-002 (syllabus, paragraph 7) (“[a] public officer subject to Ohio Const. art. II, § 20 may participate in duly authorized medical or life insurance programs available to him at the commencement of his term at any point during such term, even though he previously, during that term, declined to participate in such programs”); 1978 Op. Att’y Gen. No. 78-054 (syllabus, paragraph 1) (“[a] township trustee may opt to participate in a group health insurance plan paid for in whole, or in part, by the township under R.C. 505.60, during his existing term in office, without violating Art. II, § 20, Ohio Const., even though he had previously declined to participate in the plan, provided that participation in the plan was available to him at the commencement of his term in office”). Thus, in answer to your third question, we conclude that Article II, Section 20 of the Ohio Constitution does not prohibit a township officer who receives health insurance benefits at the commencement of his term of office from electing to discontinue receipt of those benefits mid-term. *Accord* 2005 Op. Att’y Gen. No. 2005-031 (syllabus, paragraph 3).

When Mid-Term Changes in Health Insurance Plans are Permissible

With your final question, you ask under what circumstances a political subdivision may alter pre-existing health insurance plans mid-term without violating the constitutional prohibition on mid-term changes in compensation. While we cannot iterate every possible factual scenario, the guiding principles in making such a determination are those set forth above in answer to your first and second questions. The legislative body of a political subdivision may not take direct legislative action that changes—either increasing or decreasing—the compensation an officer receives during the officer’s term. A mid-term legislative action that changes an officer’s compensation may not apply to an officer until the commencement of the next term of office.

Changes in compensation are permissible, as in the circumstances you have asked about, so long as they do not alter the original formula by which an officer’s compensation was determined at the commencement of his term. Furthermore, changes in compensation due to an alteration of the original formula are permissible so long as the change in formula was due to an external factor and not the result of direct legislative action.

Conclusions

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

1. A mid-term change in the number of dollars expended by a township on a township officer's health insurance coverage is not prohibited by Ohio Const. art. II, § 20 so long as such change is not due to a mid-term legislative change to the formula for calculating the officer's compensation.
2. Article II, Section 20 of the Ohio Constitution does not prohibit a township officer who receives health insurance benefits at the commencement of his term of office from electing to discontinue receipt of those benefits mid-term. (2005 Op. Att'y Gen. No. 2005-031, syllabus, paragraph 3, approved and followed.)

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General