December 13, 2004

The Honorable Jeffrey A. Strausbaugh
Defiance County Prosecuting Attorney
607 West Third Street
Defiance, Ohio 43512

SYLLABUS: 2004-048

A township is without authority to purchase, as a fringe benefit for its elected officers, additional service credit, as described in R.C. 145.201, in the Public Employees Retirement System.

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OPINION NO. 2004-048

The Honorable Jeffrey A. Strausbaugh
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Dear Prosecutor Strausbaugh:

You have asked whether a township has the authority to purchase, as a fringe benefit for its elected officials, additional service credit, as described in R.C. 145.201, in the Public Employees Retirement System (PERS). For the reasons discussed below, we conclude that a township possesses no such authority.

Although township employees and those of other public employers are required to be members of PERS, membership in PERS is not compulsory for persons holding elective office. R.C. 145.01(A)(1) and (B); R.C. 145.03(A). An elective officer of the State or of any political subdivision that has employees in PERS, including a township elected officer, may choose to become a member of the retirement system, however. After contributing for at least one and one-half years, the officer may purchase credit for service that was earned prior to the establishment of his membership in PERS, so long as the prior service was not covered under the Federal Insurance Contributions Act (FICA). R.C. 145.20. Furthermore, a member of PERS who is, or has been, an elected official may, prior to retirement, purchase additional service credit in an amount not to exceed 35% of the credit allowed him for his service as an elected official, except for part-time service, military service, and service that was taxed under FICA. R.C. 145.201.[1] If he does purchase additional credit under R.C. 145.201, the elected official is required to make payments, as specified in R.C. 145.201, to both the employees' savings fund and the employers' accumulation fund. *Id*. *See* R.C. 145.23 (establishing and describing funds).

The board of trustees of a non-home rule township in Defiance County voted to pay for the additional 35% service credit on behalf of any elected township officer who had completed twelve years of service, "and for each completed year thereafter," using money from the township's general fund to pay the officer's contributions to both the employees' savings fund

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[1] R.C. 145.201(C) requires that, "[a] purchase made under this section shall not exceed the limits established by division (n) of section 415 of the 'Internal Revenue Code of 1986,' 100 Stat. 2085, 26 U.S.C.A. 415(n), as amended." PERS should be contacted for information about the nature of these limitations.

and employers' accumulation fund. We understand that the salaries of the trustees and clerk were not reduced by the amount of the township's payments to PERS, *see* note 3, *infra*, and that the township has not attempted to qualify its plan with the Internal Revenue Service in order to obtain the tax benefits available to employees under qualified "pick up" plans. *See* 26 U.S.C. §§ 401, 402, 414(d) and (h), 415(n). *See also* 1984 Op. Att'y Gen. No. 84-058; 1984 Op. Att'y Gen. No. 84-036.

In a letter to your office, the township clerk stated that the purchase of service credit was in lieu of the officials accepting township-paid health insurance, and that the service credit "was to be purchased as a fringe benefit for those elected officials, once they had completed the 12 years of service."[2] We concur that, for purposes of our analysis, the township's payments for additional service credit in PERS, made on behalf of township officials, constitute fringe benefits for the officials. *See* 1984 Op. Att'y Gen. No. 84-058 (an employer's payment of an employee's retirement contribution in addition to the employee's salary is a fringe benefit); 1984 Op. Att'y Gen. No. 84-036 (same). As the court explained in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692 (1976) regarding a county's payment of insurance premiums on behalf of county officers:

> Fringe benefits, such as the payments made here, are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check. It is obvious that an office holder is benefitted and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and only then transmitted to the insurance company. Such payments for fringe benefits may not constitute 'salary,' in the strictest sense of that word, but they are compensation.

See also 1977 Op. Att'y Gen. No. 77-090 at 2-305 ("a fringe benefit is something provided at the expense of the [employer] and intended to directly benefit the employee"). Obviously, a township official would be enriched by the township's payment of retirement contributions that otherwise would be his responsibility, "just as he would be if the payment were made directly to him, and only then transmitted" to PERS. *Cf.* 1989 Op. Att'y Gen. No. 89-087 (the employer's contributions to PERS that are mandated by R.C. 145.51, although calculated as a percentage of the salaries of employees who are PERS members, R.C. 145.12, R.C. 145.48, are not compensation to the employees). *See also* note 3, *infra*.

It is well-established that elected public officials whose compensation is set by statute are not entitled to receive fringe benefits that are not statutorily provided or made available. 2000

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[2] In this instance, the resolution of the board of township trustees authorizing the payments was passed prior to the commencement of the terms of the officers who would benefit from the payments. Therefore, we need not address Ohio Const. art. II, § 20, which prohibits the compensation of a public officer from being changed during his existing term. *See* 1984 Op. Att'y Gen. No. 84-058; 1984 Op. Att'y Gen. No. 84-036.

Op. Att'y Gen. No. 2000-002 (financial disclosure filing fee); 1983 Op. Att'y Gen. No. 83-042 (attorneys' supreme court registration fee). Township trustees are paid pursuant to R.C. 505.24 and township clerks pursuant to R.C. 507.09. Certain fringe benefits are also made available to township officers under other statutory provisions. *See, e.g.*, R.C. 505.60 (health, disability, and long-term care insurance); R.C. 505.601 (reimbursement of health care premiums); R.C. 505.602 (life insurance); R.C. 505.603 (cafeteria plan for benefits). No statutory authorization exists, however, for a township to purchase on behalf of its elected officials permissive service credit in PERS.

1984 Op. Att'y Gen. No. 84-058 considered whether county elected officials could participate in a pick up plan offered as a fringe benefit to county employees, where the salaries of county employees were not reduced for tax purposes by the amount of the PERS pick up. The opinion concluded that the officers could not participate in such a plan, commonly referred to as a "pick up in lieu of salary increase" plan, because the compensation of county elected officers is set by statute, and no statute authorized such participation. Similarly, 1984 Op. Att'y Gen. No. 84-036 concluded that state elected officers and officers of local units of government whose compensation is set by statute are not entitled to fringe benefits not provided by statute, and could not participate in a pick up plan offered as a fringe benefit since there was no statutory authorization therefor.[3]

The 1984 opinions dealt with plans that were qualified under federal law to provide tax benefits to participants, were offered to employees, and involved the pick up of employees' mandatory contributions to PERS. Here, the plan has not been qualified for tax purposes, the benefit is being offered only to elected officers, and involves the pick up of permissive service credit rather than the officers' mandatory contributions. These differences do not compel a different conclusion, however. The compensation of elected township officials, like that of state, county, and other local elected officials, is set by statute and no statute authorizes them to participate in pick up plans offered as a fringe benefit where there is no corresponding reduction

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[3] 1984 Op. Att'y Gen. No. 84-058 and 1984 Op. Att'y Gen. No. 84-036 both concluded, however, that an elected official may participate in a "salary reduction" pick up plan where his agency pays on the official's behalf his mandatory employee contribution to PERS, *see* R.C. 145.47, and reduces the official's compensation by the amount of the pick up. Under this type of plan, the pick up is not a fringe benefit, but merely a different method by which the employer accounts for the official's compensation so that it may be afforded favorable tax treatment. *Id.*

As mentioned above, the township clerk has stated that the purchase of service credit by the township was "in lieu of not providing health insurance and was to be purchased as a fringe benefit" for the officers. The township's decision to purchase additional service credit rather than health insurance for its officers—that is, provide one optional fringe benefit rather than another, does not render the township's payment for service credit a "salary reduction" plan, and the township does not claim as such. As explained above, the pick ups have properly been characterized by the township as a fringe benefit.

in salary. Because elected township officials may not receive fringe benefits not authorized or provided by statute, the township may not pay on their behalf contributions to purchase permissive service credit under R.C. 145.201.

In conclusion, it is my opinion, and you are so advised, that a township is without authority to purchase, as a fringe benefit for its elected officers, additional service credit, as described in R.C. 145.201, in the Public Employees Retirement System.

Respectfully,

JIM PETRO
Attorney General