May 13, 2009

The Honorable Stephen K. Haller
Greene County Prosecuting Attorney
61 Greene Street, 2nd Floor
Xenia, Ohio 45385

SYLLABUS: 2009-015

If a board of county commissioners, in accordance with R.C. 305.171, has established a health care benefit for county officers and employees that requires the county to pay 80% and enrollees to pay 20% of the premium for such health care coverage, and thereafter implements an incentive plan that offers enrollees, in return for completion of certain goals, a month of health care coverage without payment of their 20% share of the premium, Ohio Const. art. II, § 20 prohibits a county officer enrollee from receiving, for the remainder of the term the officer was serving when the incentive plan was adopted, the one month of premium-free health care coverage under the incentive plan.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

May 13, 2009

OPINION NO. 2009-015

The Honorable Stephen K. Haller
Greene County Prosecuting Attorney
61 Greene Street, 2nd Floor
Xenia, Ohio 45385

Dear Prosecutor Haller:

You have requested an opinion concerning the prohibition against changing the compensation of a county officer mid-term. As you have explained, the county recently began a "Wellness Incentive Plan," as part of the county's health insurance program, which is a self-funded insurance program. The "Wellness Incentive Plan" ("incentive plan") entitles an enrollee who completes certain health goals within a calendar year to receive county health care coverage for the last month of the year without paying the enrollee's share of the premium for that month. You further state that the county's health plan funding account "has performed so well that there is a surplus which is used to fund the premium incentive award."

Specifically, you ask whether a county officer may participate in the county's incentive plan that commenced after the beginning of the officer's term. Your concern is whether a county officer's receipt of a one month "holiday" from paying his county health care premium may violate the prohibition in Ohio Const. art. II, § 20 against a mid-term change in the compensation of, among others, a county officer. For the reasons that follow, we conclude that if a board of county commissioners, in accordance with R.C. 305.171, has established a health care benefit for county officers and employees that requires the county to pay 80% and enrollees to pay 20% of the premium for such health care coverage, and thereafter implements an incentive plan that offers enrollees, in return for completion of certain goals, a month of health care coverage without payment of their 20% share of the premium, Ohio Const. art. II, § 20 prohibits a county officer enrollee from receiving, for the remainder of the term the officer was serving when the incentive plan was adopted, the one month of premium-free health care coverage under the incentive plan.[1]

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[1] Of course, a county officer may participate in the county's Wellness Incentive Plan to the extent that he pursues the health goals established by the plan, but simply may not, for the

Ohio Const. art. II, § 20 establishes the prohibition against mid-term changes in a public officer's compensation, as follows: "The 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." It is well established that the prohibition contained in Ohio Const. art. II, § 20 applies to county officers and to changes in their health care benefits. *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976); 2005 Op. Att'y Gen. No. 2005-046 at 2-497 ("the prohibition in Ohio Const. art. II, § 20 against in-term changes in the compensation of a public officer applies to changes in the health care benefits provided for county officers by the board of county commissioners under R.C. 305.171"). As explained by the *Parsons* court:

> 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.

46 Ohio St. 2d at 391.

Health care benefits are generally provided for county officers in accordance with a program adopted by the county's board of commissioners in accordance with R.C. 305.171, which provides various options from which the county commissioners may choose in configuring the county's health care benefit.[2] Relying upon the conclusion in 2000 Op. Att'y

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remainder of the term he was serving when the plan was adopted, receive the one month of premium-free health insurance.

[2] R.C. 305.171 describes the types of benefits a county may provide thereunder, in part, as follows:

> (A) The board of county commissioners of any county may contract for, purchase, or otherwise procure and pay all or any part of the cost of group insurance policies that may provide benefits including, but not limited to, 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, group legal services, 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 the county officers or employees are compensated for services, issued by an insurance company.
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> (B) The board of county commissioners also may negotiate and contract for any plan or plans of health care services with health insuring corporations

Gen. No. 2000-043 that the prohibition in Ohio Const. art. II, § 20 applies to in-term changes in compensation approved by subordinate bodies to whom the General Assembly has delegated the authority to fix compensation, 2005 Op. Att'y Gen. No. 2005-031 concluded that "the action taken by a board of county commissioners under R.C. 305.171 in designing a health care plan for county personnel is a type of legislative action," syllabus, paragraph 2, to which the prohibition of Ohio Const. art. II, § 20 applies.

With this background in mind, let us turn to the situation you describe. You have explained that the county commissioners have adopted an incentive plan as part of the county's health care benefit for its personnel. Prior to the adoption of the incentive plan, an enrollee received twelve months of health care coverage in exchange for the enrollee's payment of 20% of the annual premium for such coverage; each month of the year, an enrollee paid 1/12 of 20% of the cost of such health care coverage. Under the incentive plan, however, an enrollee who meets certain health goals becomes entitled to receive health care benefits for twelve months in exchange for the enrollee's payment of only 11/12 of 20%, *i.e.*, approximately 18.3%, of the annual premium. Because the former county insurance program did not provide for the receipt of health care coverage for any period of time at no cost to the enrollee, the adoption of the incentive plan makes available to enrollees who choose to participate in the incentive plan an increased health care benefit than that previously available to enrollees. Moreover, because the county commissioners' configuration of a county's health care benefit under R.C. 305.171 is a legislative act, any change by the commissioners to that configuration, *e.g.*, adoption of the incentive plan, may not be applied to a county officer for the remainder of the term he was serving when the changed configuration was adopted.[3]

> holding a certificate of authority under Chapter 1751. of the Revised Code, provided that each county officer or employee shall be permitted to do both of the following:
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> (1) Exercise an option between a plan offered by an insurance company and a plan or plans offered by health insuring corporations under this division, on the condition that the county officer or employee shall pay any amount by which the cost of the plan chosen by the county officer or employee pursuant to this division exceeds the cost of the plan offered under division (A) of this section;
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> (2) Change from one of the plans to another at a time each year as determined by the board.

R.C. 9.833 authorizes political subdivisions that provide health care benefits for subdivision personnel to provide such benefits through various types of self-insurance programs.

[3] 2005 Op. Att'y Gen. No. 2005-031, at 2-327 n.8, explained the types of changes in insurance benefits that may and may not be applied to an officer mid-term, as follows:

> A number of Attorney General opinions that have examined the question of changes in officers' health care benefits in relation to the prohibition in Ohio

Based upon the foregoing, it is my opinion, and you are hereby advised that if a board of county commissioners, in accordance with R.C. 305.171, has established a health care benefit for county officers and employees that requires the county to pay 80% and enrollees to pay 20% of the premium for such health care coverage, and thereafter implements an incentive plan that offers enrollees, in return for completion of certain goals, a month of health care coverage without payment of their 20% share of the premium, Ohio Const. art. II, § 20 prohibits a county officer enrollee from receiving, for the remainder of the term the officer was serving when the

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Const. art. II, § 20 against in-term changes in compensation have concluded, in reliance upon *Collins v. Ferguson* and 1981 Op. Att'y Gen. No. 81-099, that a change in the premium payable for an officer's health insurance benefits, without a change in the health care coverage provided, is not a prohibited in-term change in compensation. *See, e.g.*, 2004 Op. Att'y Gen. No. 2004-004 (syllabus, paragraph five) (if the cost of a county officer's health care coverage increases mid-term without any change in the coverage provided, Ohio Const. art. II, § 20 does not prohibit the county from paying the increased cost); 1989 Op. Att'y Gen. No. 89-003 (syllabus, paragraph two) (the county's payment of an increase in the premium cost of a group insurance policy for a county officer does not violate the prohibition of Ohio Const. art. II, § 20, "provided that the benefits procured are unchanged, and the total percentage of the entire premium cost paid by the board of county commissioners remains the same"). Although not always expressly stated in these opinions, the assumption is that the "formula" defining the officers' health care benefit options at the commencement of their terms included the county's payment of a percentage of each premium, such percentage remaining unchanged during the officers' terms.

Other Attorney General opinions have found that Ohio Const. art. II, § 20 prohibits an officer from receiving increased coverage, or benefiting from an increase in the percentage of premium paid by a county on behalf of an officer mid-term, if such change is the result of the actions of the county commissioners during an officer's term in modifying the "formula" pursuant to which it provides health care benefits for county personnel. *See, e.g.*, 2004 Op. Att'y Gen. No. 2004-004 (syllabus, paragraph six) (if the cost of a county officer's health insurance premium increases mid-term due to a change in the amount or type of coverage provided, Ohio Const. art. II, § 20 prohibits the county from paying such increased premium on behalf of the officer); 1993 Op. Att'y Gen. No. 93-045 (a county's mid-term decrease in the percentage of an officer's health insurance premium paid by the county is prohibited by Ohio Const. art. II, § 20); 1984 Op. Att'y Gen. No. 84-069 at 2-224 (contrary to Ohio Const. art. II, § 20, "[b]y assuming and paying a greater portion of an officer's health insurance premiums than that paid when the officer commenced his term, the county is extending a more valuable fringe benefit to the officer and is thus increasing the officer's compensation").

incentive plan was adopted, the one month of premium-free health care coverage under the incentive plan.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General