October 4, 2007

The Honorable Roger D. Nagel
Fulton County Prosecuting Attorney
123 Courthouse Plaza
Wauseon, Ohio 43567

SYLLABUS: 2007-032

1. The amendment of R.C. 9.833 in Am. Sub. H.B. 46, 126th Gen. A. (2006) (eff. Aug. 17, 2006), which authorizes political subdivisions to establish a health savings account (HSA) program for subdivision personnel, does not preclude a township from exercising its authority under R.C. 9.833(B)(1) to establish for township personnel a self-insured health care benefits program, any part of which, if possessed of the characteristics of a "self-insured medical reimbursement plan," as described in 26 U.S.C.A. § 105, constitutes a health reimbursement arrangement (HRA) for purposes of 26 U.S.C.A. §§ 105 and 106.

2. Unless the terms of the resolution under which health care benefits were provided to township personnel at the commencement of a trustee's term included the option of participation in a self-insured health care benefit program that meets the requirements of an HRA, Ohio Const. art. II, § 20 prohibits a township trustee from commencing, mid-term, participation in any such program first authorized by the board of trustees after the commencement of the trustee's term of office.

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OPINION NO. 2007-032

The Honorable Roger D. Nagel
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Wauseon, Ohio 43567

Dear Prosecutor Nagel:

We have received your opinion request in which you ask about the authority of a board of township trustees under R.C. 9.833 to establish self-insurance programs for township personnel. Based upon conversations with one of your assistants, we have restated your questions, as follows:

1. Does the General Assembly's recent amendment of R.C. 9.833 to expressly authorize political subdivisions to establish health savings account programs for subdivision personnel preclude such subdivisions from establishing a Health Reimbursement Arrangement (HRA) plan as part of a self-insurance program under R.C. 9.833?

2. If a township may establish an HRA as part of a self-insurance program under R.C. 9.833, would the participation of a township trustee in such a plan during his or her current term of office constitute a violation of the constitutional prohibition against elected officials receiving a midterm increase in compensation?

As you state in your opinion request letter:

> Our concerns about [HRAs] as permissible self-insurance funding mechanisms authorized under R.C. § 9.833 are due in large part to the legislature's 2006 amendment of the statute to expressly allow for Health Savings Accounts (HSA) as that term is provided for and defined by § 233 of the Internal Revenue Code. Given that both are specifically provided for . . . by the [Internal Revenue Code], but possess several of the same characteristics, does the express

> allowance of [HSAs] within the statute without providing for [HRAs] exclude the use of [HRAs]?

Authority of Board of Township Trustees to Provide Health Care Benefits

We begin with the principle that a board of township trustees, as a creature of statute, possesses only those powers and duties conferred upon it by statute. *See generally In re Village of Holiday City*, 70 Ohio St. 3d 365, 369, 639 N.E.2d 42 (1994) (it is a "well-settled principle that township trustees can exercise only those powers granted by the General Assembly"); *Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875). Thus, whether a board of township trustees may provide the type of health insurance arrangement you describe for township personnel depends upon whether it has been authorized by statute to do so.

The General Assembly has provided townships numerous options for securing health care benefits for township officers and employees. *See* R.C. 505.60, R.C. 505.601. One such option is provided by R.C. 505.60(D), which authorizes a township to provide health care benefits by different methods, including "through an individual self-insurance program or a joint self-insurance program as provided in [R.C. 9.833]." You specifically question the scope of authority conferred upon boards of township trustees by R.C. 9.833(B).[1]

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[1] Concerning the provision of health care benefits through a program of self-insurance, R.C. 9.833(B) authorizes political subdivisions, including townships, to:

> (1) Establish and maintain an individual *self-insurance program* with public moneys *to provide authorized health care benefits*, including but not limited to, health care, prescription drugs, dental care, and vision care, in accordance with division (C) of this section;
>
> (2) *Establish 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. *A health savings account program may be a part of a self-insurance program*.
>
> (3) After establishing an individual self-insurance program, agree with other political subdivisions that have established individual self-insurance programs for health care benefits, that their programs will be jointly administered in a manner specified in the agreement;
>
> (4) Pursuant to a written agreement and in accordance with division (C) of this section, join in any combination with other political subdivisions to establish and maintain a joint self-insurance program to provide health care benefits;
>
> (5) Pursuant to a written agreement, join in any combination with other political subdivisions to procure or contract for policies, contracts, or plans of

For purposes of answering your questions, divisions (B)(1) and (2) of R.C. 9.833 are of particular importance. R.C. 9.833(B)(1) expressly authorizes a township to "establish and maintain an individual self-insurance program with public moneys to provide authorized health care benefits, including but not limited to, health care, prescription drugs, dental care, and vision care, in accordance with division (C) of this section."[2] R.C. 9.833(B)(2) currently contains the health savings account provisions, *see* note one, *supra*, which were added to R.C. 9.833 by Am. Sub. H.B. 46, 126th Gen. A. (2006) (eff. Aug. 17, 2006).

As amended by Am. Sub. H.B. 46, R.C. 9.833(B)(2), in part, authorizes political subdivisions to establish and maintain a health savings account (HSA) program "whereby *employees or officers may establish* and maintain health savings accounts in accordance with section 223 of the Internal Revenue Code," (emphasis added). In addition, a "health savings account program may be a part of a self-insurance program." R.C. 9.833(B)(2). You question whether the addition to R.C. 9.833 of division (B)(2), which expressly authorizes a political subdivision to establish an HSA program, while not also expressly authorizing a political subdivision to establish a health reimbursement arrangement (HRA), indicates the General Assembly's intention that a political subdivision has no authority under R.C. 9.833 to establish

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> insurance to provide health care benefits, which may include a *health savings account program*, for their officers and employees subject to the agreement;
>
> (6) *Use in any combination any of the policies, contracts, plans, or programs authorized under this division*. (Emphasis added.)

[2] R.C. 9.833(C) governs the manner in which political subdivisions that establish and maintain health care self-insurance programs for subdivision personnel may exercise that authority. Matters addressed in R.C. 9.833(C) include, among others, the duty to establish reserves in an amount necessary to cover potential costs of health care benefits, the establishment of a special account for such reserves, the authority to contract for the administration of the self-insurance program, the duty to contract with a member of the American Academy of Actuaries to prepare a report of the reserves and disbursements of funds, the allocation of costs among members of a joint self-insurance fund, and the authority to issue bonds "pursuant to an ordinance or resolution of its legislative authority or other governing body for the purpose of providing funds to pay expenses associated with the settlement of claims, whether by way of a reserve or otherwise, and to pay the political subdivision's portion of the cost of establishing and maintaining an individual or joint self-insurance program or to provide for the reserve in the special fund authorized by division (C)(2) of this section," R.C. 9.833(C)(9). As provided by R.C. 9.833(E), however, the requirements concerning the establishment of necessary reserves and a special fund for such reserves, as well as the duty to contract with a member of the American Academy of Actuaries for certification and reporting purposes, do not apply to an individual self-insurance program of a county, township, or municipality.

an HRA for subdivision personnel.[3] For the reasons that follow, we do not believe that the amendment of R.C. 9.833 in Am. Sub. H.B. 46 precludes a township from establishing an HRA as a self-insurance program for township personnel under R.C. 9.833(B)(1).

Health Savings Accounts (HSAs)

In order to address your concerns, we must first briefly examine the concepts of HSAs and HRAs.[4] As defined in 26 U.S.C.A. § 223(d)(1), a "health savings account" (HSA) is, with certain limitations, "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*." (Emphasis added.) Establishment of an HSA, which meets the requirements of the Internal Revenue Code (IRC), entitles an account beneficiary who is an "eligible individual"[5] to receive certain tax advantages.[6] One prerequisite for qualifying as an "eligible individual" is the

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[3] Am. Sub. H.B. 46, 126th Gen. A. (2006) (eff. Aug. 17, 2006), also amended R.C. 9.833 by adding to the authority of political subdivisions under division (B)(5) to enter into written agreements with other political subdivisions to procure or contract for policies, contracts, or plans of insurance for the provision of health care benefits, the authority to include health savings accounts in such agreements.

[4] Whether a particular arrangement qualifies as a "health savings account," as defined in 26 U.S.C.A. § 223(d)(1), or as a "health reimbursement arrangement," for purposes of 26 U.S.C.A. §§ 105 and 106, and whether a particular employee may be entitled to favorable federal income tax treatment for benefits received under either such plan are separate questions that this opinion does not address.

[5] For purposes of 26 U.S.C.A. § 223, an "eligible individual" is defined in 26 U.S.C.A. § 223(c)(1), in part, as follows:

> (A) In general.—The term "eligible individual" means, *with respect to any month*, any individual if—
>
> (i) such individual is covered under a *high deductible health plan* as of the 1st day of such month, and
>
> (ii) such individual is *no*t, while covered under a high deductible health plan, *covered under any health plan*—
>
> (I) which is not a high deductible health plan, and
>
> (II) which provides coverage for any benefit which is covered under the high deductible health plan. (Emphasis added.)

[6] For example, the employer of an account beneficiary may contribute to the employee's HSA, and such contributions are excludable from the employee's gross income in accordance with 26 U.S.C.A. § 106(a). Also, cash paid into the account by or on behalf of the beneficiary by someone other than the employer is, with certain limitations, deductible by the beneficiary under 26 U.S.C.A. § 223(a). In addition, under 26 U.S.C.A. § 223(f)(1), "[a]ny amount paid or

person's coverage under a high deductible health plan (HDHP).[7] *See* 26 U.S.C.A. § 223(c)(1)(A)(ii) (making an individual ineligible if covered by any other health plan that is not an HDHP and that provides coverage for any benefit covered under the HDHP).[8]

R.C. 9.833(B)(2) authorizes a political subdivision to expend public moneys "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," and to include an HSA program as part of its self-insurance program. Although a political subdivision may establish and maintain a program under which its personnel establish their own HSAs and may expend public moneys as set forth above to help support such HSAs, the responsibility for administering each HSA is strictly that of the employee.

Health Reimbursement Arrangements (HRAs)

Unlike HSAs, HRAs are not specifically provided for in the Internal Revenue Code, but were first addressed in Rev. Rul. 2002-41, 2002-28 I.R.B. 75. HRAs are a type of employer-provided medical care expense reimbursement arrangement that may qualify for favorable tax treatment. 2002-28 I.R.B. 75 summarized Rev. Rul. 2002-41, in part, as follows:

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distributed out of a health savings account which is used exclusively to pay qualified medical expenses of any account beneficiary shall not be includible in gross income."

[7] 26 U.S.C.A. § 223(c)(2)(A) defines a "high deductible health plan" (HDHP), as used in 26 U.S.C.A. § 223, in part, as follows:

> The term "high deductible health plan" means 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.

[8] There are various limitations on the manner in which funds in an HSA may be used. For example, in order to enjoy the tax advantages of an HSA, the account beneficiary may pay only "qualified medical expenses" from the HSA. *See generally* 26 U.S.C.A. § 223(d)(2)(A) (for purposes of 26 U.S.C.A. § 223, "qualified medical expenses" means "with respect to an account beneficiary, amounts paid by such beneficiary for medical care (as defined in section 213(d)[)] for such individual, the spouse of such individual, and any dependent (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) of such individual, but only to the extent such amounts are not compensated for by insurance or otherwise").

> This ruling describes an employer-provided medical care expense reimbursement plan called a health reimbursement arrangement (HRA), in which reimbursements for medical care expenses made from the plan are excludable from employee gross income. Among other things, the HRA described retains favorable tax treatment because it only reimburses employees or former employees for medical care expenses of the employee or former employee and their spouses and dependents; is *solely employer-funded* and not paid for directly or indirectly from salary reduction; and although it allows participants to carry forward unused amounts for use in later coverage periods, these amounts may never be used for anything but reimbursements for qualified medical expenses. (Emphasis added.)

Through the use of an HRA, employer-provided coverage and qualified medical expense reimbursements to the employee are excludable from the employee's gross income under 26 U.S.C.A. §§ 106 and 105, respectively.

26 U.S.C.A. § 105 establishes additional requirements and limitations applicable to a medical reimbursement plan that is self-insured.[9] For example, in order to constitute an HRA, a self-insured medical reimbursement plan may not, with certain exceptions, discriminate in favor of "highly compensated individuals" in terms of eligibility to participate, 26 U.S.C.A. § 105(h)(2)(A), or benefits received, 26 U.S.C.A. § 105(h)(2)(B). *See generally* 26 U.S.C.A. § 105(h)(5) (defining "highly compensated individual," as used in 26 U.S.C.A. § 105); 26 C.F.R. § 1.105-11 (self-insured medical reimbursement plans). Thus, an employer's self-funded health care reimbursement arrangement that possesses the characteristics outlined in Rev. Rul. 2002-41 constitutes an HRA; if such an arrangement is self-insured, it must also meet the requirements established by 26 U.S.C.A. § 105.

Thus, an HRA possesses certain characteristics that distinguish it from an HSA. For our purposes, the significant difference is that an employer political subdivision may establish an HRA, funded solely by the employer, in which its personnel may participate, while HSAs may be established by individual employees or officers of the political subdivision and may be funded, in whole or in part, by the employing political subdivision.

Whether Township Possesses Authority under R.C. 9.833 to Establish an HRA

Having outlined the basic elements of HSAs and HRAs, we now turn to your specific concern that Am. Sub. H.B. 46's amendment of R.C. 9.833, which specifically authorizes a political subdivision to establish an HSA program, indicates the General Assembly's intention

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[9] *See* 26 U.S.C.A. § 105(h)(6) (defining the term "self-insured medical reimbursement plan," as meaning, "a plan of an employer to reimburse employees for expenses referred to in [26 U.S.C.A. § 105(b), *i.e.*, expenses incurred by an employee for the medical care, as defined in 26 U.S.C.A. § 213(d), of the taxpayer, spouse, and dependents, as defined in 26 U.S.C.A. § 152 without regard to 26 U.S.C.A. § 152(b)(1), (b)(2), and (d)(1)(B)] for which reimbursement is not provided under a policy of accident and health insurance").

that the establishment and maintenance of an HRA, not being expressly mentioned in R.C. 9.833, is outside the authority granted to political subdivisions by that statute.

Your concern appears to arise from the general rule of statutory construction under which the language of one statute or part of a statute is compared to that of another statute or part of a statute. Such a comparison may suggest whether the use of language in one instance, but not in another, indicates the General Assembly's intent to limit the statutory authority to the particular situation described in the statute and to no other. *See, e.g.*, *Lake Shore Electric Ry. Co. v. Public Utilities Commission*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the General Assembly intended a term to have a particular meaning, "it would not have been difficult [for it] to find language which would express that purpose," having used that language in other connections). *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result).

We first note that, even prior to its amendment in Am. Sub. H.B. 46, R.C. 9.833 authorized political subdivisions to establish self-insured health care benefit programs for subdivision personnel. *See* Sub. H.B. 185, 125th Gen. A. (2004) (eff., Aug. 31, 2004) (R.C. 9.833(B)(1)). Thus, if a political subdivision established a self-insured health care benefit program under former R.C. 9.833(B)(1) that reimbursed subdivision personnel for only those medical care expenses for which an HRA may reimburse taxpayers and that possessed the other features of an HRA, the subdivision's establishment of an HRA was encompassed within its authority to establish a self-insured health care benefit program. Because the amendment of R.C. 9.833 in Am. Sub. H.B. 46 retained the authority of subdivisions under division (B)(1) to establish self-insured medical health care benefit programs, we conclude that political subdivisions retain the authority under R.C. 9.833(B)(1) to establish a self-insured health care benefit program, any part of which, if possessed of certain characteristics, as described in 26 U.S.C.A. § 105, constitutes an HRA for purposes of 26 U.S.C.A. §§ 105 and 106.[10]

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[10] We caution, however, that there may be various restraints on the power of township trustees in the establishment of a self-insured health care benefit program that preclude the township from establishing a self-insured health care benefit program under R.C. 9.833 that possesses the characteristics of an HRA. For example, an HRA may not discriminate in favor of "highly compensated individuals" in terms of eligibility to participate, 26 U.S.C.A. § 105(h)(2)(A), or benefits received, 26 U.S.C.A. § 105(h)(2)(B). In a particular instance, however, a township may be unable to meet these nondiscrimination requirements because of the terms of a collective bargaining agreement under R.C. Chapter 4117 requiring payment of a certain sum or the provision of particular benefits for health care of certain township personnel, while being subject to different terms with respect to other township employees covered by a different agreement. *See generally, e.g.*, 2004 Op. Att'y Gen. No. 2004-004 (syllabus, paragraph 2) ("[a] board of county commissioners may charge its employees whose compensation is fixed by a collective bargaining agreement a sum for health care insurance as dictated by the

Further evidence that the General Assembly did not intend the amendment of R.C. 9.833 in Am. Sub. H.B. 46 to preclude a subdivision from establishing a self-insured health care benefit program with the characteristics of an HRA lies in the language of R.C. 9.833(B)(6), retained by Am. Sub. H.B. 46, which continues to authorize a political subdivision to "[u]se in any combination any of the policies, contracts, plans, or programs authorized under this division." *See generally* 2001 Op. Att'y Gen. No. 2001-025 at 2-141 (finding that R.C. 505.60 and R.C. 9.833 "[evidence] a clear intent by the General Assembly to grant townships a broad, flexible range of options under which to provide health care coverage for their officers and employees"). Consistent with this legislative intent, the amendment of R.C. 9.833 in Am. Sub. H.B. 46 should be read as authorizing political subdivisions to add another health care benefit option to those already available to their personnel by expressly authorizing political subdivisions to do those things necessary, *i.e.*, "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," R.C. 9.833(B)(2), to enable their personnel to take advantage of the newly recognized HSAs.[11]

In answer to your first question, we conclude that the amendment of R.C. 9.833 in Am. Sub. H.B. 46, 126th Gen. A. (2006) (eff. Aug. 17, 2006), which authorizes political subdivisions to establish a Health Savings Account (HSA) program for subdivision personnel as one health care benefit option for subdivision personnel, does not preclude a township from exercising its authority under R.C. 9.833(B)(1) to establish for township personnel a self-insured health care benefits program, any part of which, if possessed of the characteristics of a "self-insured medical reimbursement plan," as described in 26 U.S.C.A. § 105, constitutes a health reimbursement arrangement (HRA) for purposes of 26 U.S.C.A. §§ 105 and 106.

Constitutional Prohibition Against In-term Increases in Compensation

Your second question asks whether article II, § 20 of the Ohio Constitution prohibits a township officer from participating in an HRA program first offered by the township after the township officer's term has commenced. To ascertain whether a board of township trustees'

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agreement, while charging a different sum to other county employees, so long as the differences in amount have a rational basis"). It is possible, therefore, that a township's duty to pay different sums or provide different benefits for health care coverage for different township personnel prevents the township from establishing a self-insured health care benefit program that meets the nondiscrimination requirements of an HRA. Whether the restraints imposed upon a board of township trustees with respect to fixing the compensation of township personnel prevents the township from complying with the nondiscrimination requirements applicable to an HRA is a determination that may be made only in light of each township's circumstances.

[11] Section 223 was added to Title 26 of the United States Code by the Medicare Prescription Drug, Improvement, And Modernization Act of 2003. *See* Pub. L. No. 108-173, 117 Stat. 2066 (2003).

inclusion of an HRA as a health care option for township personnel under R.C. 9.833 is a "change" in the health care component of a township trustee's compensation for purposes of Ohio Const. art. II, § 20, one must examine the resolution that established health care benefits for township personnel at the commencement of the trustee's current term of office to determine whether that resolution authorized the provision of a self-insured health care benefit program that possesses the characteristics of an HRA. Unless the terms of the resolution under which health care benefits were provided to township personnel at the commencement of the trustee's term included the option of participation in a self-insured health care benefit program that meets the requirements of an HRA, Ohio Const. art. II, § 20 prohibits a township trustee from commencing, mid-term, participation in any such program first authorized by the board of trustees after the commencement of the trustee's term of office. *See* 2005 Op. Att'y Gen. No. 2005-031 (application of Ohio Const. art. II, § 20 to health care benefits provided to a county officer).

Conclusions

Based upon the foregoing, it is my conclusion, and you are hereby advised that:

1. The amendment of R.C. 9.833 in Am. Sub. H.B. 46, 126th Gen. A. (2006) (eff. Aug. 17, 2006), which authorizes political subdivisions to establish a health savings account (HSA) program for subdivision personnel, does not preclude a township from exercising its authority under R.C. 9.833(B)(1) to establish for township personnel a self-insured health care benefits program, any part of which, if possessed of the characteristics of a "self-insured medical reimbursement plan," as described in 26 U.S.C.A. § 105, constitutes a health reimbursement arrangement (HRA) for purposes of 26 U.S.C.A. §§ 105 and 106.

2. Unless the terms of the resolution under which health care benefits were provided to township personnel at the commencement of a trustee's term included the option of participation in a self-insured health care benefit program that meets the requirements of an HRA, Ohio Const. art. II, § 20 prohibits a township trustee from commencing, mid-term, participation in any such program first authorized by the board of trustees after the commencement of the trustee's term of office.

Respectfully,

MARC DANN
Attorney General