August 7, 2003

The Honorable Craig L. Roth
Williams County Prosecuting Attorney
1210 West High Street
Bryan, Ohio 43506

SYLLABUS: 2003-027

1. Based upon *State ex rel. Hess v. City of Akron*, 132 Ohio St. 305, 7 N.E.2d 411 (1937), 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. When such a waiver is executed and the county auditor is presented with a proper order or voucher for the payment of less compensation than is prescribed by statute, the auditor is required pursuant to R.C. 319.16 to issue a warrant on the county treasury for the amount of compensation set forth in the order or voucher. (1922 Op. Att'y Gen. No. 3210, vol. I, p. 477, overruled, in part.)

2. The federal income tax Form W-2 of an elected county official or a member of a board of elections who is paid less annual compensation than he is entitled to receive by statute should show the actual amount of compensation paid to the official or board member.

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August 7, 2003

OPINION NO. 2003-027

The Honorable Craig L. Roth
Williams County Prosecuting Attorney
1210 West High Street
Bryan, Ohio 43506

Dear Prosecutor Roth:

You have requested an opinion concerning the propriety of elected county officials[1] and members of a board of elections to request and receive less than their statutorily-prescribed compensation. By way of background, you state that "an elected full-time county official whose compensation is provided in the Ohio Revised Code, wishes to waive his rights to a statutorily provided pay increase." In a second situation, a member of the board of elections "wishes to forego all or at least most of his statutorily provided compensation." These two persons thus wish to waive[2] all or a portion of the compensation that they are statutorily entitled to receive as

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[1] For the purpose of this opinion, the term "elected county officials" means county commissioners, *see* R.C. 305.01, county prosecuting attorneys, *see* R.C. 309.01, county sheriffs, *see* R.C. 311.01, county coroners, *see* R.C. 313.01, county engineers, *see* R.C. 315.01, county recorders, *see* R.C. 317.01, county auditors, *see* R.C. 319.01, county treasurers, *see* R.C. 321.01, common pleas court judges, *see* R.C. 2301.01, and common pleas court clerks, *see* R.C. 2303.01. In this opinion we have limited our examination to the ability of the foregoing elected county officials and the members of a county board of elections to waive receipt of a portion of their compensation. We do not consider whether any other appointed or elected officers of state or local government may waive receipt of a portion of their statutorily-prescribed compensation.

[2] A waiver is "a voluntary relinquishment of a known right." *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St. 3d 431, 435, 732 N.E.2d 960 (2000); *accord State ex rel. Hess v. City of Akron*, 132 Ohio St. 305, 307, 7 N.E.2d 411 (1937); *City of N. Olmsted v. Eliza Jennings, Inc.*, 91 Ohio App. 3d 173, 180, 631 N.E.2d 1130 (Cuyahoga County 1993).

an elected county official and as a member of the board of elections, respectively.[3] Accordingly, you have asked the following questions:

1. Is the County Auditor authorized to pay an elected full-time county official less than the compensation provided by statute when the county official so requests?

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[3] Under the facts presented in your letter, it is clear that the persons in question are not accepting the full amount of their statutory compensation and donating a portion of that compensation to the county. *See generally* 1933 Op. Att'y Gen. No. 114, vol. I, p. 129, at 131 ("[t]here is no doubt but that the salary of a judge belongs to him, regardless of the source from which it comes, and he can dispose of it in any manner he sees fit. If he desires to give to the county the amount which would be the state's proportion of the reduction of his salary had he not constitutional protection, I see nothing to prevent him from doing so"); 1932 Op. Att'y Gen. No. 3962, vol. I, p. 73 (syllabus, paragraph one) ("[a] public officer may, lawfully, if he sees fit, draw his salary or compensation and donate a portion or all of it to the political subdivision from which it was drawn. A previous agreement to do so, however, is not [enforceable], as it is contrary to public policy and therefore void"). Also, these persons are not entering into a contractual agreement with the county to accept less compensation than they are statutorily entitled to receive. *See generally* 1932 Op. Att'y Gen. No. 3962, vol. I, p. 73 (syllabus, paragraph two) ("[a] contract whereby a public officer agrees to perform services required of him by law for a less compensation than that fixed by law, is contrary to public policy, and void"). *See generally also* Annotation, *Validity and Effect of Agreement by Public Officer or Employee to Accept Less than Compensation or Fees Fixed by Law, or of Acceptance of Reduced Amount,* 160 A.L.R. 490 (1946); Annotation, *Validity and Effect of Agreement by Public Officer or Employee to Accept Less than Compensation or Fees Fixed by law, or of Acceptance of Reduced Amount,* 118 A.L.R. 1458 (1939); Annotation, *Validity of Agreement by Public Officer to Accept Less than Compensation or Fees Fixed by Law*, 70 A.L.R. 972 (1931). Finally, this is not an instance of candidates seeking election to a public office offering or agreeing to accept no compensation or less compensation than is provided by statute. *See generally Prentiss v. Dittmer,* 93 Ohio St. 314, 112 N.E. 1021 (1916) (syllabus, paragraph one) ("[a]n offer by a candidate for common pleas judge … [to] accept for his judicial services only the stipulated salary payable by the state, and that he will accept nothing that may be due and payable to him from the local or county treasury, is against public policy and an offense within the purview of [G.C. 5175-26], which, if proven, invalidates his election"). *See generally also* Annotation, *Statement by Candidate Regarding Salary or Fees of Office as Violation of Corrupt Practice Acts or Bribery,* 106 A.L.R. 493 (1937). This opinion, therefore, is limited to examining the propriety of an elected county official or a member of a board of elections waiving the receipt of all or a portion of his statutorily-prescribed compensation.

2. Is the County Auditor authorized to reduce the compensation provided by statute to a member of the Board of Elections when the member so requests?

3. If the answer to either or both of the foregoing is yes, is the W-2 form to be issued to reflect the actual compensation paid or the statutorily provided compensation?

For ease of discussion, we will consider your first two questions together. In order to answer these questions, we must first review the statutes governing the payment of compensation to elected county officials and members of a board of elections and the county auditor's duties with respect to such payments. If this review discloses that a county auditor is authorized to pay an elected county official or member of a board of elections less compensation than is prescribed by statute, we must then determine whether the official or board member is permitted to waive all or a portion of the compensation to which he is statutorily entitled.

R.C. 325.01 provides that the county auditor, county treasurer, common pleas court clerk, county sheriff, county recorder, county commissioners, county prosecuting attorney, and county coroner "shall receive, out of the general county fund, compensation as provided by [R.C. 325.03-.11 and R.C. 325.15], payable in the same manner as provided for county employees in [R.C. 325.17]." Under R.C. 325.17, the compensation of county employees hired by the officers mentioned in R.C. 325.27[4] and the officials listed in R.C. 325.01 is to "be paid biweekly from the county treasury, upon the warrant of the auditor." *See* R.C. 325.01. The compensation of the county engineer is established pursuant to R.C. 325.14, and is "paid monthly out of the general county fund or out of the county's share of the fund derived from the receipts from motor vehicle licenses … and the county's share of the fund derived from the motor vehicle fuel tax …, as the board of county commissioners directs, upon the warrant of the county auditor." R.C. 325.14. The county's portion of the compensation payable to the judges of the court of common pleas is established under R.C. 141.05, and is paid either biweekly or monthly from the county treasury, upon the warrant of the county auditor.[5] R.C. 141.05. Pursuant to R.C. 3501.12, the compensation of the members of the board of elections is paid monthly from the county treasury, in pursuance of appropriations by the board of county commissioners to the board of elections, upon the warrant of the county auditor. *See* R.C. 3501.17. Accordingly, the compensation of elected county officials and members of a board of elections is paid either biweekly or monthly from the county treasury, upon the warrant of the county auditor.

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[4] The officers mentioned in R.C. 325.27, which provides for the disposition of fees, costs, percentages, penalties, allowances, and other perquisites collected or received by law as compensation for services, are the county auditor, county treasurer, probate judge, county sheriff, common pleas court clerk, county engineer, and county recorder.

[5] Pursuant to R.C. 141.04(A)(4), a portion of the compensation payable to the judges of the court of common pleas is paid either biweekly or monthly from the state treasury.

The duties of a county auditor with respect to the issuance of warrants to pay the compensation of public officers and employees are set forth in R.C. 319.16. This statute provides, in relevant part:

> The county auditor *shall issue warrants* … on the county treasurer for all moneys payable from the county treasury, *upon presentation of the proper order or voucher and evidentiary matter for the moneys*…. The auditor *shall not issue a warrant* for the payment of any claim against the county, unless it is allowed by the board of county commissioners, *except where the amount due is fixed by law or is allowed by an officer or tribunal*…. If the auditor questions the validity of an expenditure that is within available appropriations and for which a proper order or voucher and evidentiary matter is presented, the auditor shall notify the board, officer, or tribunal who presented the voucher. If the board, officer, or tribunal determines that the expenditure is valid and the auditor continues to refuse to issue the appropriate warrant on the county treasury, a writ of mandamus may be sought. The court shall issue a writ of mandamus for issuance of the warrant if the court determines that the claim is valid. (Emphasis added.)

See generally R.C. 5705.46 ("[e]ach political subdivision may make expenditures for the payment of current payrolls upon the authority of a proper appropriation for such purpose, provided that the positions of such employees and their compensation have been determined prior thereto by resolution, ordinance, or in the manner provided by law"). Thus, upon the presentation of a proper order or voucher, a county auditor is required to issue a warrant on the county treasury to pay the compensation of an elected county official or a member of the board of elections. *See Giuliani v. Perk*, 14 Ohio St. 2d 235, 237 N.E.2d 397 (1968); *State ex rel. Hoel v. Goubeaux*, 110 Ohio St. 287, 144 N.E. 251 (1924); 1929 Op. Att'y Gen. No. 1216, vol. III, p. 1808; 1929 Op. Att'y Gen. No. 1093, vol. II, p. 1635.

The amount of compensation that an elected county official or member of the board of elections is to be paid biweekly or monthly from the county treasury is determined in the manner prescribed by statute. *See* R.C. 141.05; R.C. 325.03-.11; R.C. 325.14; R.C. 325.15; R.C. 325.18; R.C. 3501.12. Once this amount is determined, the county auditor, upon the presentation of a proper order or voucher setting forth that amount, is required to issue a warrant on the county treasury for that amount. R.C. 319.16; *see* 1929 Op. Att'y Gen. No. 1216, vol. III, p. 1808; 1929 Op. Att'y Gen. No. 1093, vol. II, p. 1635.

Thus, it is clear that a county auditor is statutorily required to issue a warrant for the specific amount of compensation that is set forth in an order or voucher that is presented to him. A county auditor has no authority to change the amount of compensation set forth in an order or voucher. Accordingly, if an order or voucher sets forth an amount of compensation that is less than that to which an elected county official or a member of the board of elections is statutorily

entitled, the county auditor is required to issue a warrant for that amount.[6] *See generally* 1929 Op. Att'y Gen. No. 1216, vol. III, p. 1808 (syllabus, paragraph three) ("[i]t is the legal duty of a county auditor to draw warrants in payment of a monthly payroll for deputies and clerks in the various county offices in accordance with the payroll as certified, provided such payroll calls for the payment of a monthly installment of salary no greater than one-twelfth of the amount determined upon as the annual salary of any such deputy or clerk"); 1929 Op. Att'y Gen. No. 1093, vol. II, p. 1635 (syllabus) ("[w]hen a court has fixed the annual compensation of a court stenographer … at $1800.00 per year, and the board of county commissioners has appropriated only $1500.00 for such purpose, it is the duty of the county auditor to issue his warrant on the county treasurer for the payment of such compensation in the amount of $150.00 per month until such time as the appropriation shall have become exhausted"). It follows, therefore, that, when a county auditor is presented with an order or voucher that sets forth an amount of compensation that is less than that to which an elected county official or a member of the board of elections is statutorily entitled, the auditor is authorized to pay the official or board member the lesser compensation.

We must now determine whether an elected county official or a member of the board of elections is permitted to waive all or a portion of the compensation to which he is statutorily entitled. In Ohio, it is well established that "the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy." *State ex rel. Hess v. City of Akron*, 132 Ohio St. 305, 307, 7 N.E.2d 411 (1937); *accord Sanitary Commercial Services, Inc. v. Shank*, 57 Ohio St. 3d 178, 180, 566 N.E.2d 1215 (1991); *Hightower v. Hightower*, 2002-Ohio-5488, at ¶28, 2002 Ohio App. LEXIS 5486, at *11 (Franklin County Oct. 10, 2002). Under this doctrine, the Ohio Supreme Court has determined that "[t]he occupant of a public office may waive part of the established salary thereof," and "[s]uch a waiver is not contrary to public policy." *State ex rel. Hess v. City of Akron*, 132 Ohio St. 305, 7 N.E.2d 411 (syllabus, paragraphs one and two); *accord Welsch v. City of Youngstown*, 28 Ohio L. Abs. 297, 1938 Ohio Misc. LEXIS 934 (Ct. App. Mahoning County 1938); *City of Cleveland v. Phillips*, 19 Ohio L. Abs. 71, 1935 Ohio Misc. LEXIS 1281 (Ct. App. Cuyahoga County 1935), *appeal dismissed*, 130 Ohio St. 49, 196 N.E. 416 (1935); 1949 Op. Att'y Gen. No. 566, p. 271; 1943 Op. Att'y Gen. No. 5791, p. 35; 1942 Op. Att'y Gen. No. 4967, p. 214; *see also Miller v. City of Marion*, 89 Ohio App. 429, 103 N.E.2d 27 (Ct. App. Marion County 1950); *Lehman v. City of Toledo*, 48 Ohio App. 121, 192 N.E. 537 (Ct. App. Lucas County 1934); 1932 Op. Att'y Gen. No. 3962, vol.

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[6] Pursuant to R.C. 319.16, a county auditor may question the "validity of an expenditure that is within available appropriations and for which a proper order or voucher and evidentiary matter is presented." If an auditor questions an expenditure, the auditor must notify the board, officer, or tribunal that presented the order or voucher for a determination as to the validity of the expenditure. R.C. 319.16. If the board, officer, or tribunal determines that the expenditure is valid, the auditor must "issue the appropriate warrant on the county treasury," or be compelled by a writ of mandamus to issue the warrant. *Id.*

I, p. 73. *See generally* R.C. 507.09(B) ("[a]ny township clerk may elect to receive less than the compensation the clerk is entitled to under [R.C. 507.09(A)]"). *But see generally* 1922 Op. Att'y Gen. No. 3210, vol. I, p. 477, at 479 ("[a]ny arrangement whereby an officer attempts to waive salary or to stipulate for the performance of the duties of the office at a less salary than is provided by law, is contrary to public policy and void").[7] Accordingly, based upon *State ex rel. Hess v. City of Akron*, a public officer may voluntarily waive all or a portion of his statutorily-prescribed compensation.[8]

Further, it is our opinion that such a waiver does not violate Ohio Const. art. II, § 20, which provides 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." (Emphasis added.) This constitutional provision prohibits any change, whether an increase or decrease, in a public

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[7] Since the issuance of 1922 Op. Att'y Gen. No. 3210, vol. I, p. 477, various courts in Ohio and opinions of the Attorneys General have concluded that a public officer is permitted to waive all or a portion of his statutory compensation. See text above. Thus, 1922 Op. Att'y Gen. No. 3210, vol. I, p. 477 is overruled insofar as it advises otherwise.

[8] A public officer that has voluntarily waived all or a portion of his statutorily-prescribed compensation may not thereafter request and receive payment of the compensation he waived. *See State ex rel. Hess v. City of Akron*, 132 Ohio St. 305, 7 N.E.2d 411 (1937); *Welsch v. City of Youngstown*, 28 Ohio L. Abs. 297, 1938 Ohio Misc. LEXIS 934 (Ct. App. Mahoning County 1938); *City of Cleveland v. Phillips*, 19 Ohio L. Abs. 71, 1935 Ohio Misc. LEXIS 1281 (Ct. App. Cuyahoga County 1935), *appeal dismissed*, 130 Ohio St. 49, 196 N.E. 416 (1935); 1949 Op. Att'y Gen. No. 566, p. 271; 1943 Op. Att'y Gen. No. 5791, p. 35; 1942 Op. Att'y Gen. No. 4967, p. 214; *see also* 1932 Op. Att'y Gen. No. 3962, vol. I, p. 73 (syllabus, paragraph three) ("[a]lthough the general rule is that the acceptance of less compensation than that established by law for the office does not estop an officer from subsequently claiming the legal compensation circumstances may be such that an officer who, voluntarily, with full knowledge of his right to full compensation, and moved by force of an independent consideration freely accepts a lesser amount in full satisfaction for his services will be precluded from later claiming more than the amount so accepted"). *But see generally* 1922 Op. Att'y Gen. No. 3210, vol. I, p. 477 (syllabus, paragraph two) ("[w]here a county surveyor in the year 1918, filed application with the board of county commissioners for leave of absence without pay while in the military service of the United States, and the county commissioners passed a resolution purporting to grant such leave, and the county surveyor entered such military service and remained therein for the last six months of 1918 following his application for leave of absence, such county surveyor is not now barred from asserting a claim to payment of such salary. Accordingly, the salary for said period of six months constitutes a claim against the county, of which the surveyor is entitled to payment without reference to allowance or disallowance by the board of county commissioners").

officer's compensation during his existing term. *See, e.g.*, 2003 Op. Att'y Gen. No. 2003-014, slip op. at 7 n.12; 2000 Op. Att'y Gen. No. 2000-043 at 2-261.

The purpose of constitutional provisions prohibiting in-term changes in the compensation of public officers was explained in *State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 278, 282, 39 N.E.2d 840 (1942), as follows:[9]

> The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed by the Legislature during the term; that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary; and *that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins*….
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> ….
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> The inhibition found in Section 14, Article IV of the Constitution,[10] to the effect that the compensation of common pleas judges "as may be provided by law," that is, by the Legislature, "shall not be diminished, or increased, during their term of office," *is directed to the Legislature and not to the officer who pays the compensation or to the judge who receives it.* The inhibition, according to the language of the Constitution thus directed to the Legislature, is that *it* shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. (Emphasis and footnote added.)

Ohio Const. art. II, § 20 thus operates to prohibit, *inter alia*, the General Assembly and the public from decreasing the compensation of a public officer who has begun serving his term in office. This prohibition ensures that the General Assembly and the public will not bring improper influence to bear on a public officer by decreasing his compensation. If a public

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[9] In addition to Ohio Const. art. II, § 20, other constitutional provisions prohibit in-term changes in the compensation of specific public officers. *See, e.g.*, Ohio Const. art. II, § 31 ("[t]he members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, … and no change in their compensation shall take effect during their term of office"); Ohio Const. art. III, § 19 (the executive officers of the state shall receive a compensation, established by law, "which shall neither be increased nor diminished during the period for which they shall have been elected"); Ohio Const. art. IV, § 6 (judges of courts of records shall receive "such compensation as may be provided by law, which shall not be diminished during their term of office").

[10] Ohio Const. art. IV, § 14 was repealed on January 10, 1970. *See* 1967-1968 Ohio Laws, Part II-III, 2878 (Am. Sub. House Joint Resolution No. 42, adopted Mar. 1, 1968). Language similar to that which appeared in Ohio Const. art. IV, § 14 now appears in Ohio Const. art. IV, § 6. *See* note nine, *supra*.

officer's compensation can be decreased during his term in office by the General Assembly or his public constituency, the public officer may be tempted to perform his duties and exercise his discretion in a manner that forecloses that eventuality. It is apparent that "[t]he self interest of [a] public official and the public interests which he represents, must not be brought into conflict." *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902); *accord Halliday v. Norfolk & W. Ry. Co.*, 44 Ohio L. Abs. 208, 213, 62 N.E.2d 716 (Ct. App. Franklin County 1945); 1973 Op. Att'y Gen. No. 73-043 at 2-167 and 2-168. Accordingly, the language of Ohio Const. art. II, § 20 prohibiting an in-term change in a public officer's compensation protects a public officer from improper influence by the General Assembly or the larger electorate and permits a public officer to perform his duties and exercise his discretion in a completely objective and disinterested manner.

When a public officer voluntarily waives all or a portion of his statutorily-prescribed compensation, neither the General Assembly nor the public has decreased the compensation to which the public officer is statutorily entitled. The public officer thus cannot be said to be subject to improper influence by the General Assembly or his public constituency since neither is reducing the public officer's compensation. Consequently, the principal mischief at which the constitutional prohibition against in-term changes in compensation is aimed is not present when a public officer voluntarily waives all or a portion of his statutorily-prescribed compensation, and thus there is no violation of Ohio Const. art. II, § 20 in that situation.[11] *City of Cleveland v. Phillips*, 19 Ohio L. Abs. 71, 1935 Ohio Misc. LEXIS 1281 (Ct. App. Cuyahoga County 1935), *appeal dismissed*, 130 Ohio St. 49, 196 N.E. 416 (1935).

Elected county officials and members of boards of elections are public officers. *See, e.g., State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (members of boards of election are public officers); *State ex rel. Kirk v. Wheatley*, 133 Ohio St. 164, 12 N.E.2d 491 (1938) (county engineer is a public officer); *State ex rel. Kopp v. Blackburn*, 132 Ohio St. 421, 8 N.E.2d 434 (1937) (common pleas clerk is a public officer). *See generally State ex rel. Landis v. Bd. of Comm'rs of Butler County*, 95 Ohio St. 157, 159, 115 N.E. 919 (1917) ("[t]he usual criteria in determining whether a position is a public office are durability of tenure, oath, bond,

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[11] Because a public officer possesses a right to his statutorily-prescribed compensation, an officer who voluntarily waives all or a portion of his compensation may, at any time, rescind his waiver and henceforth receive all of the compensation to which he is statutorily entitled. *See generally State ex rel. Wilcox v. Woldman*, 157 Ohio St. 264, 271, 105 N.E.2d 44 (1952) (the statutory compensation of a public officer belongs to the incumbent as an incident of the office and as a matter of right); *State ex rel. Clinger v. White*, 143 Ohio St. 175, 179, 54 N.E.2d 308 (1944) (a person rightfully holding a public office is entitled to the compensation attached thereto as an incident to his title to the office). In such a situation, Ohio Const. art. II, § 20 is not violated since the compensation of the public officer has not been increased during his term of office by the General Assembly or his public constituency. *See State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 278, 282, 39 N.E.2d 840 (1942).

emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him"). Therefore, based upon *State ex rel. Hess v. City of Akron*, 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. When such a waiver is executed and the county auditor is presented with a proper order or voucher for the payment of less compensation than is prescribed by statute, the auditor is required pursuant to R.C. 319.16 to issue a warrant on the county treasury for the amount of compensation set forth in the order or voucher.

Your second question asks whether the federal income tax Form W-2 (Form W-2) of an elected county official or a member of a board of elections who is paid less annual compensation than he is statutorily entitled to receive should include the actual compensation paid to him or the amount of compensation prescribed by statute. Form W-2 is a federal income tax form used by employers to report to the Secretary of the Treasury the wages and other compensation paid to employees. *See* 26 U.S.C. § 6011; 26 C.F.R. § 1.6041-2. The form is also used by employers to furnish this information to employees. *See* 26 U.S.C. § 6051; 26 C.F.R. § 31.6051-1. Resolution of your final question thus requires an interpretation of the federal statutes and administrative regulations governing an employer's obligation to report on Form W-2 the amount of wages and other compensation paid to an employee.[12]

Prior opinions have stated that the Attorney General is not empowered to provide definitive interpretations of federal statutes or administrative regulations. 1999 Op. Att'y Gen. No. 99-007 at 2-55; 1988 Op. Att'y Gen. No. 88-007 at 2-22. However, the Attorney General is authorized to advise prosecuting attorneys regarding a county's responsibility to implement a particular federal program. 1989 Op. Att'y Gen. No. 89-001 at 2-1 n.1. *See generally* 1988 Op. Att'y Gen. No. 88-007 at 2-22 ("absent a definitive interpretation of 41 C.F.R. § 1-15.713-7, I can only advise you in this situation whether your interpretation of the language of that section comports with your duty to carry out the responsibilities imposed on you by state and federal law"). Accordingly, we can advise you as to the county's duty to furnish the information required by Form W-2.

26 U.S.C. § 3402(a) states, in part, that, "[e]xcept as otherwise provided in this section, every *employer* making payment of wages[13] shall deduct and withhold upon such wages a tax

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[12] Because your question concerns the specific amount of wages and other compensation paid to an employee that is to be reported on Form W-2, this opinion does not address whether an employer is required in a particular situation to prepare a Form W-2 for the Secretary of the Treasury or an employee.

[13] 26 U.S.C. § 3401(a) defines "wages" as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *Accord* 26 C.F.R. § 31.3401(a)-1(a)(1). Moreover, the term "wages" specifically includes salaries that are paid as

determined in accordance with tables or computational procedures prescribed by the Secretary [of the Treasury]." (Emphasis and footnote added.) 26 U.S.C. § 3403 further states that "[t]he *employer* shall be liable for the payment of the tax to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment." (Emphasis added.) For purposes of these sections, the term "employer" includes counties. 26 U.S.C. § 3401(d); 26 C.F.R. § 31.3401(d)-1(d); *see* 26 U.S.C. § 3401(c). A county, as an employer, thus is required to deduct and withhold the federal income tax from the wages of its employees[14] and is liable for the payment of that tax.

In addition to being required to deduct and withhold the federal income tax from its employees' wages, the county has the concomitant duty to annually prepare and provide each employee with a written statement on Form W-2 showing, *inter alia*, the total amount of wages the county paid to the employee during the previous calendar year. 26 U.S.C. § 6051(a)(3); 26 C.F.R. § 31.6051-1; *see* 26 C.F.R. 1.6041-2(a)(1). *See generally* 26 U.S.C. § 6011(a) ("[w]hen required by regulations prescribed by the Secretary [of the Treasury] any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary" and include in the return or statement any "information required by such forms or regulations").

Specifically, 26 U.S.C. § 6051(a) provides, in part:

> Every person required to deduct and withhold from an employee a tax under section 3101 or 3402, or who would have been required to deduct and withhold a tax under section 3402 (determined without regard to subsection (n)) if the employee had claimed no more than one withholding exemption … shall furnish to each such employee *in respect of the remuneration paid by such person to such employee* during the calendar year, on or before January 31 of the succeeding year, or, if his employment is terminated before the close of such calendar year, within 30 days after the date of receipt of a written request from the employee if such 30-day period ends before January 31, a written statement showing the following:
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> ….
>
> (3) the total amount of wages as defined in section 3401(a)[.] (Emphasis added.)

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compensation for services performed by an employee for his employer. 26 C.F.R. § 31.3401(a)-1(a)(2).

[14] "The term *employee* includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee." 26 C.F.R. § 31.3401(c)-1(a); *see* 26 U.S.C. § 3401(c). The term specifically includes "an officer, employee, or elected official" of any state or county. 26 U.S.C. § 3401(c); *accord* 26 C.F.R. § 31.3401(c)-1(a).

Similarly, 26 C.F.R. § 31.6051-1(a)(1)(i) states, in part:

> Every employer, as defined in section 3401(d), required to deduct and withhold from an employee a tax under section 3402, or who would have been required to deduct and withhold a tax under section 3402 (determined without regard to section 3402(n)) if the employee had claimed no more than one withholding exemption, shall furnish to each such employee, *in respect of the remuneration paid by such employer to such employee* during the calendar year, the tax return copy and the employee's copy of a statement on Form W-2. (Emphasis added.)

Accordingly, pursuant to 26 U.S.C. § 6051(a) and 26 C.F.R. § 31.6051-1(a)(1)(i), the total amount of wages, as defined in 26 U.S.C. § 3401(a), an employer pays to an employee in a calendar year must be shown on Form W-2. *See generally* 26 C.F.R. 1.6041-2(a)(1) ("[w]ages, as defined in section 3401, *paid* to an employee are required to be reported on Form W-2" (emphasis added)); 26 C.F.R. § 31.3401(a)-1(a)(2) ("salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of [26 U.S.C. § 3401] *if paid as compensation* for services performed by the employee for his employer" (emphasis added)).

In light of the foregoing, it is readily apparent that Form W-2 should show the actual amount of compensation paid to an elected county official or a member of the board of elections, rather than the amount of compensation that the official or board member is statutorily entitled to be paid. If the county reports on Form W-2 the amount of compensation an official or board member is statutorily entitled to be paid, the county's action would not comport with the aforementioned federal statutes and administrative regulations. For these reasons, the federal income tax Form W-2 of an elected county official or a member of a board of elections who is paid less annual compensation than he is entitled to receive by statute should show the actual amount of compensation paid to the official or board member.

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Based upon *State ex rel. Hess v. City of Akron*, 132 Ohio St. 305, 7 N.E.2d 411 (1937), 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. When such a waiver is executed and the county auditor is presented with a proper order or voucher for the payment of less compensation than is prescribed by statute, the auditor is required pursuant to R.C. 319.16 to issue a warrant on the county treasury for the amount of compensation set forth in the order or voucher. (1922 Op. Att'y Gen. No. 3210, vol. I, p. 477, overruled, in part.)

2. The federal income tax Form W-2 of an elected county official or a member of a board of elections who is paid less annual compensation than

he is entitled to receive by statute should show the actual amount of compensation paid to the official or board member.

Respectfully,

JIM PETRO
Attorney General