Note from the Attorney General's Office:

1972 Op. Att'y Gen. No. 72-059 was clarified by 1980 Op. Att'y Gen. No. 80-002.

1972 Op. Att'y Gen. No. 72-059 was overruled by 1983 Op. Att'y Gen. No. 83-036.

OPINION NO. 72-059

Syllabus:

The payment of hospitalization benefits for a municipal official, by an ordinance adopted after the beginning of the official's term, is contrary to Article II, Section 20 of the Constitution of Ohio, and to Section 731.07, Revised Code. (Opinion No. 69-034, Opinions of the Attorney General for 1969, approved and followed.)

To: John W. Weaner, Pros. Atty., Defiance County, Defiance, Ohio
By: William J. Brown, Attorney General, July 27, 1972

Your request for my opinion states the facts and poses the question in the following language:

> "The Mayor and Auditor of the City of Defiance took office on January 1, 1968. The City passed an ordinance May 19, 1968, providing hospitalization benefits for City employees and elected officials. Subsequently the City has provided the Mayor and the Auditor with hospitalization benefits.
>
> "The Bureau of Inspection and Supervision of Public Offices has issued a finding against the Mayor and Auditor. The Bureau has taken the position that the providing of hospitalization benefits to elected officials of a statutory plan City after the beginning of their term is an increase in salary contrary to Ohio Revised Code Section 731.07.
>
> "I would appreciate your opinion as to whether the providing of hospitalization benefits to elected officials of a statutory plan City, after the beginning of their term, is an increase of their salary, contrary to Ohio Revised Code Section 731.07."

Section 731.07, Revised Code, which prohibits any increase in the salary of an elected city official during the term for which he was elected, provides as follows:

> "The salary of any officer, clerk, or employee of a city shall not be increased or diminished during the term for which he was elected or appointed.
>
> "Unless otherwise provided, all fees pertaining to any office shall be paid into the city treasury."

A similar prohibition as to village officers appears in Section 731.13, Revised Code, which reads as follows:

> "The legislative authority of a village shall fix the compensation and bonds of all officers, clerks, and employees of the village except as otherwise provided by law. The legislative authority shall, in the case of elective officers, fix their compensation for the ensuing term of office at a meeting held not later than five days prior to the last day fixed by law for filing as a candidate for such office. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk, or employee is elected or appointed."

Since the City of Defiance has no charter there can be no doubt that Section 731.07, supra, is controlling. One of my predecessors so held in Opinion No. 4322, Opinions of the Attorney General for 1954. In discussing the applicability of that Section and Section 731.13, supra, he said (at pages 506-507):

> "In the absence of a charter we must look to the statute for the power of the several municipal officers, for where the municipality concerned has chosen not to adopt a charter, and has thus elected to operate under a statutory plan of municipal government, it must accept such limitations on the powers of its officers, including its legislative authority, as is provided in such statutory plan."

Sections 731.07 and 731.13, supra, were enacted by the General Assembly pursuant to the mandate of the State Constitution imposing upon the legislature the duty to fix the term of office and the compensation of all officers where not so fixed by the Constitution itself. Article II, Section 20 of the Constitution, provides:

> "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."

The import of the general prohibition of Section 20, supra, against any increase in the compensation of an officer during his term of office is emphasized by repetition in those Articles of the Constitution which deal specifically with the legislative, the executive, and the judicial branches of the government.

Thus, Article II, Section 31 of the Constitution, limits the compensation of the members of the General Assembly in the following language:

> "The members and officers of the General Assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office."

Article III, Section 19 of the Constitution, similarly limits the compensation of officials of the executive department. It provides as follows:

> "The officers mentioned in this article shall, at stated times, receive, for their services, a compensation to be established by law, which shall neither be increased nor diminished during the period for which they shall have been elected."

Article IV, Section 14 of the Constitution, which Article makes provision for the judiciary, originally contained similar limitations on the compensation of some judges. By a 1968 amendment, however, Section 14, supra, was repealed and replaced by a new Section which contains the same limitations, except that the Judges of the Supreme Court, the Courts of Appeals and the Courts of Common Pleas are no longer prohibited from receiving an increase in compensation during their term of office. The new Section 6 (B) of Article IV, Ohio Constitution, provides as follows:

> "(B) The judges of the supreme court, courts of appeals, and of the courts of common pleas, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void."

The Supreme Court has recently held that Section 6 (B), supra, has no application to municipal court judges, and that the salary of such judges is, therefore, controlled by the prohibitions of Article II, Section 20, supra. State, ex rel. Wallace v. Celina, 29 Ohio St. 2d 109 (1972), rehearing denied May 10, 1972.

Although the terms "salary" and "compensation" appear to be used interchangeably in the above quoted passages from the Constitution, some early interpretations drew a distinction and held that the amount of "compensation" might be varied during an officer's term although the "salary" must remain fixed. See, e.g., Gobrecht v. Cincinnati, 51 Ohio St. 68, 72-73 (1894). Expressions in two later cases led one of my predecessors to

conclude that the two words were used in the Constitution without substantial difference in meaning. See the discussion of State, ex rel. Lueders v. Beaman, 106 Ohio St. 650 (1922), and State, ex rel. DeChant v. Kelser, 133 Ohio St. 429 (1938), by my predecessor in Opinion No. 117, Opinions of the Attorney General for 1945; Opinion No. 387, Opinions of the Attorney General for 1945; Opinion No. 469, Opinions of the Attorney General for 1945; and Opinion No. 2159, Opinions of the Attorney General for 1947. Further consideration of the Supreme Court's Opinions has convinced other Attorneys General that "salary" was intended to have a narrower meaning than "compensation", the latter term being broad enough to include both a fixed salary and also fees which depend upon the amount of services rendered. However, they also came to the conclusion that, wherever a definite salary is a part of an officer's total compensation, the limitations of Article II, Section 20, supra, apply to the whole. Thus, in Opinion No. 1540, Opinions of the Attorney General for 1952, the then Attorney General said (at pages 475-476):

> "The total compensation of a township clerk being a composite, a compensible ceiling of this nature affects, at least indirectly, every component part of the whole. It is significant, as pointed out in my Opinion No. 978, discussed above, that the Supreme Court, in those cases in which an officer's total compensation has consisted even in part of a fixed and definite salary not dependent on services rendered, has held that Article II, Section 20, was applicable. * * *"

See also Opinion No. 978, Opinions of the Attorney General for 1951; Opinion No. 843, Opinions of the Attorney General for 1951; Opinion No. 4614, Opinions of the Attorney General for 1954; and Opinion No. 69-034, Opinions of the Attorney General for 1969.

I approve and follow the reasoning of this latter line of Opinions. In your case the mayor and the auditor have definite salaries. Consequently, if the hospitalization benefits be considered either "compensation" or "salary", the result, with respect to the terms then being served, was a prohibited increase under Article II, Section 20, supra, and Sections 731.07 and 731.13, supra, since the benefits became effective after the beginning of such terms. The real question is whether the benefits can be considered something other than "compensation" or "salary".

My predecessors have held repeatedly that similar insurance payments on behalf of a public employee are compensation. Opinion No. 37, Opinions of the Attorney General for 1927; Opinion No. 2055, Opinions of the Attorney General for 1928; Opinion No. 3383, Opinions of the Attorney General for 1931; Opinion No. 882, Opinions of the Attorney General for 1937. In Opinion No. 2171, Opinions of the Attorney General for 1961, the then Attorney General specifically held that the payment of hospitalization premiums was part of the compensation of municipal employees. And, In Opinion No. 69-034, Opinions of the Attorney General for 1969, my immediate predecessor came to the same conclusion as to hospitalization premiums paid for county employees. The syllabus of that Opinion reads as follows:

> "The board of county commissioners is not authorized to expend public funds for the payment

> of premiums on a group hospitalization plan for public officers, as provided in Section 305.171, Revised Code, which plan would begin after the commencement of the existing statutory terms of such officers, since such expenditures would be in violation of Section 20, Article II, Ohio Constitution."

In the course of that Opinion, my predecessor said (at page 60):

> "* * * Undoubtedly, the proposed premium payments on behalf of those county officers who come within the purview of Section 20, Article II, supra, would be an increase in their compensation, and would, in the words of Opinion No. 387, supra, 'affect the salary' which they receive, in violation of this constitutional provision." (Emphasis added.)

The only decision to the contrary, so far as I can determine, appears to be a case which you mention in a note at the end of your letter. In that case the Court of Appeals for the Ninth Judicial District held (Madden v. Bower, 49 Ohio Op. 2d 469 (1969)):

> "* * * The payment of the hospitalization insurance premiums for all public officers and public employees is neither compensation nor salary within the meaning of Section 20, Article II, of the Ohio Constitution. The payment of such premiums are an incidental 'fringe benefit,' not payable directly to the employee, the fruit of which he can receive only upon the happening of an uncertain future event."

Although it cited no authority for the above proposition, the Court of Appeals directed the county auditor to pay the premiums for all county officers regardless of the dates on which their terms began. The Court also directed the auditor to pay the premium out of the county general fund rather than out of other special funds from which the compensation of employees was, by statute, to be paid.

The Supreme Court's Opinion in the case is reported as Madden v. Bower, 20 Ohio St. 2d 135 (1969). The auditor had not appealed that part of the Court of Appeals' decision directing payment of the premiums of officers, but the county commissioners did appeal the use of the county general fund. The Supreme Court, therefore, was not faced with the issue you have posed here, i.e., whether the hospitalization premiums are an increase in compensation. But the Court did point out (at page 136) that, shortly after the decision of the Court of Appeals, the General Assembly had amended Section 305.171, Revised Code, which authorizes the county commissioners to pay hospitalization premiums for county officers and employees, by adding that such premiums should be paid

> "* * * from the funds or budgets from which said officers or employees are compensated for services." (Emphasis added.)

Moreover, the first branch of the syllabus holds that:

> "[T]hat 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." (Emphasis added.)

And, in the course of the Opinion, the Court said (at page 138) that the part of the premium, provided by the special funds from which certain employees were, by statute, to be paid,

> "* * * is a part of the cost of the services rendered by such employees in the furtherance of the purposes for which those statutes were enacted and for which those funds were established and are maintained."

I think it clear that the Court of Appeals was mistaken and that the payment of hospitalization premiums for a public official with public funds is additional compensation. To evade the issue by use of the term "fringe benefits," not payable directly to the employee, is to do by indirection what cannot be done directly. State, ex rel. Mikus v. Roberts, 15 Ohio St. 2d 253, 257 (1968); State, ex rel. v. Raine, 49 Ohio St. 580, 582 (1892). See also State, ex rel. Boyd v. Tracy, 128 Ohio St. 242 (1934) (living expenses held salary); Opinion No. 737, Opinions of the Attorney General for 1963 (longevity compensation held salary).

In specific answer to your question it is, therefore, my opinion, and you are so advised, that the payment of hospitalization benefits for a municipal official, by an ordinance adopted after the beginning of the official's term, is contrary to Article II, Section 20 of the Constitution of Ohio, and to Section 731.07, Revised Code. (Opinion No. 69-034, Opinions of the Attorney General for 1969, approved and followed.)