

Note from the Attorney General's Office:

1989 Op. Att'y Gen. No. 89-009 was overruled in part by
2008 Op. Att'y Gen. No. 2008-018.

OPINION NO. 89-009

Syllabus:

A board of township trustees may not make monetary payments or grant compensation increases to township officers and employees as reimbursement for deductible payments those officers and employees incur in connection with health care insurance policies that are procured and paid for by the board pursuant to the terms of R.C. 505.60(A).

To: Anthony G. Pizza, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 23, 1989

You have requested my opinion regarding health insurance benefits that are provided to township officers and employees by a board of township trustees pursuant to R.C. 505.60. Specifically, you wish to know whether a board of township trustees may, for the purpose of obtaining a more economical health insurance premium, contract for a group health insurance plan that has a higher deductible payment and thereafter reimburse directly township officers and employees for those higher payments, or, in the alternative, grant those officers and employees a pay increase sufficient to offset their increased deductible payments.

I commence my analysis of your question with R.C. 505.60, which addresses the authority of a board of township trustees to obtain various forms of health care insurance for township officers and employees and their immediate dependents. R.C. 505.60(A) reads, in pertinent part, as follows:

The board of township trustees of any township may *procure and pay all or any part of the cost of insurance policies* that may provide benefits for hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, prescription drugs, or sickness and accident insurance, or a combination of any of the foregoing types of insurance for township officers and employees. If the board so procures any such insurance policies, the board shall provide uniform coverage under these policies for township officers and full-time township employees and their immediate dependents and may provide coverage under these policies for part-time township employees and their immediate dependents, from the funds or budgets from which the officers or employees are compensated for services, whether such policies are issued by an insurance company, a medical care corporation organized under Chapter 1737. of the Revised Code, or a dental care corporation organized under Chapter 1740. of the Revised Code duly authorized to do business in this state. Any township officer or employee may refuse to accept the insurance coverage without affecting the availability of such insurance coverage to other township officers and employees.

The board may also contract for group insurance or health care services with health care corporations organized under Chapter 1738. of the Revised Code and health maintenance organizations organized under Chapter 1742. of the Revised Code for township officers and employees. (Emphasis added.)

Thus, under R.C. 505.60(A), a board of township trustees may procure for township officers and employees insurance policies that provide benefits pertaining to the types of health care described in that section. R.C. 505.60(A) further authorizes a board of township trustees to pay "all or any part of the cost" of such insurance policies "from the funds or budgets from which the officers or employees are compensated for services."¹

¹ R.C. 505.60(A) also states that a board of township trustees may provide the health care insurance benefits authorized thereby, without competitive bidding, "by contributing to a health and welfare trust fund

I find that R.C. 505.60(A) provides the answer to the question whether a board of township trustees may reimburse township officers and employees for a portion of the deductible payments that those officers and employees incur in accordance with the terms of a health care insurance policy procured and purchased by the board under such section. In particular, I am of the opinion that R.C. 505.60(A) does not permit a board of township trustees to provide reimbursement to township officers and employees for such deductible payments. R.C. 505.60(A) is quite explicit about the actions a board of township trustees may take with respect to health care insurance for township officers and employees. R.C. 505.60(A) enumerates the specific types of health care insurance policies a board of township trustees may procure for the benefit of township officers and employees. R.C. 505.60(A) expressly authorizes a board of township trustees to pay all or any part of the cost of those policies from the funds or budgets from which those officers and employees are otherwise compensated. There is no mention in R.C. 505.60(A), however, of any payments that township trustees may make to township officers and employees as reimbursement for deductible payments incurred by such officers and employees in connection with those insurance policies. Certainly, the General Assembly could have included an express statement to that effect in R.C. 505.60(A) had it intended to confer such authority unequivocally upon the township trustees. The conspicuous absence of such a statement in R.C. 505.60(A) suggests that such authority on the part of a board of township trustees may not be implied. See generally *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571, 572 (1916) ("[t]he authority to act in financial transactions must be clear and distinctly granted," and any doubt regarding the authority of a governmental entity to expend public funds must be resolved against the expenditure).

Thus, the express language of R.C. 505.60, in light of the analysis used by the Ohio Supreme Court in *Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), has been interpreted as imposing a restriction upon the authority of a board of township trustees to provide medical benefits to township officers and employees in a particular manner. 1984 Op. Att'y Gen. No. 84-086; 1982 Op. Att'y Gen. No. 82-076. In *Ebert v. Stark County Board of Mental*

administered through or in conjunction with a collective bargaining representative of the township employees." As I have noted previously, this language of R.C. 505.60(A) thus permits a board of township trustees to make the provision of the health care insurance benefits enumerated therein the subject of a collective bargaining agreement that is negotiated between the township and its employees in accordance with the pertinent provisions of R.C. Chapter 4117 (public employees collective bargaining). 1984 Op. Att'y Gen. No. 84-086 at 2-297 and 2-298 n. 4. With respect to such agreements, R.C. 4117.08(A) declares that "[a]ll matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in [R.C. 4117.08]." Health care insurance is not included among the exceptions set forth in R.C. 4117.08. *Id.* R.C. 4117.10(A) further states, in pertinent part, that where no collective bargaining agreement exists or where a collective bargaining agreement makes no specification about a particular matter, "the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees," and that R.C. Chapter 4117 "prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in [R.C. Chapter 4117] or as otherwise specified by the general assembly." There is no indication in your letter that the health care insurance benefits in question are to be provided to township employees as part of a collective bargaining agreement, nor is there any such suggestion in the documentation that accompanied your letter. Accordingly, I shall, in this opinion, confine my consideration of your question within the context of health care insurance benefits that are provided by a board of township trustees under R.C. 505.60(A) apart from any collective bargaining agreements. See also note three, *infra*.

Retardation the court reiterated the general proposition announced in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976) that fringe benefits such as health care insurance coverage or sick leave credits are to be considered a part of an employee's compensation; accordingly, the power of a governmental entity to fix the compensation of its employees includes the power to grant those employees fringe benefits, provided it complies with any statutes that may establish minimum requirements for, or limits upon, the provision of such fringe benefits. 1981 Op. Att'y Gen. No. 81-052 elaborates upon those principles at 2-202 as follows:

Once the requisite authority to compensate has been established, any statutory provisions pertinent to the provision of the particular fringe benefit in issue by the public employer to its employees must be identified. If the particular fringe benefit is not the subject of any statutory provisions applicable to the public employer or its employees, the fringe benefit in question is a permissible exercise of the public employer's authority to compensate its employees. On the other hand, if the particular fringe benefit is the subject of any statutory provision applicable to the public employer or its employees, further consideration is required. If an applicable statute constitutes a minimum statutory entitlement to a particular benefit, the public employer may, pursuant to its power to compensate and in the absence of any statute constricting its action in the particular case, choose to provide such benefit in excess of the minimum statutory entitlement. *If an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit.* (Emphasis added.)

Thus, in Op. No. 82-076 my predecessor addressed the question whether a board of township trustees was permitted, pursuant to R.C. 505.60, to pay medical claims incurred by township officers and employees during a period of time in which their health care insurance had lapsed as a result of the insurer's bankruptcy. Concluding that R.C. 505.60 does not permit such payments, my predecessor stated that R.C. 505.60 "must be seen as a restriction upon the authority of a board of township trustees to provide medical benefits to its employees." *Id.* at 2-211. More recently, I concurred in this characterization of R.C. 505.60 in considering whether an earlier version of that statute precluded a board of township trustees from distinguishing between part-time and full-time employees in providing health care insurance coverage, and required that any policy procured thereunder must include dependents of township employees. Op. No. 84-086 at 2-296 ("this language of [R.C. 505.60] must be viewed as a restriction on the authority of a board of township trustees to procure health benefits").² Accordingly, I concluded that R.C. 505.60 did not permit a board of township trustees to make such a distinction, insofar as such a distinction was not expressly delineated in the statute itself.

Similarly, in this instance I am of the opinion that the express language of R.C. 505.60(A) must be viewed as a restriction upon the authority of a board of township trustees with respect to both the manner in which the board may provide health care insurance for township officers and employees, and the arrangements incidental thereto that the board may undertake. The language of R.C. 505.60(A) limits the authority of a board of township trustees to procuring and paying all or any part of the cost of insurance policies that provide health care benefits for

² The version of R.C. 505.60 examined in 1984 Op. Att'y Gen. No. 84-086 stated that a board of township trustees could procure health insurance for the purpose of providing "uniform coverage for township officers and employees and their immediate dependents." In 1986 the General Assembly amended R.C. 505.60 for the purpose of adding thereto language distinguishing full-time and part-time township employees and granting a board of township trustees the option of obtaining health care insurance for part-time township employees and their immediate dependents. See 1985-1986 Ohio Laws, Part II 4468 (Am. H.B. 470, eff. March 5, 1987).

township officers and employees. R.C. 505.60(A) does not confer upon a board of township trustees the power either to pay directly the medical claims of township officers and employees, or reimburse those individuals for health care expenses such as deductible payments they themselves may have incurred. Thus, absent a more definite statement from the General Assembly in this regard, I am constrained to conclude that R.C. 505.60(A) does not confer upon a board of township trustees the authority to make monetary payments to township officers and employees as reimbursement for deductible payments those officers and employees incur in connection with health care insurance policies that are procured by the board pursuant to that statute.³

I now direct my attention to your alternative inquiry, whether a board of township trustees may grant township officers and employees salary increases sufficient to offset increases in deductible payments incurred by those officers and employees in connection with health care insurance policies that are purchased by the board under R.C. 505.60(A). R.C. 511.10 grants a board of township trustees the following general authority to appoint and compensate township employees: "The board of township trustees may appoint such superintendents, architects, clerks, laborers, and other employees as are necessary and fix their compensation." Other provisions within R.C. Title 5 (townships) further address the power of a board of township trustees to hire and compensate specific classes of township employees. *See, e.g.*, R.C. 505.37(A) (the board of township trustees "may compensate the members of a [township] volunteer fire company on any basis and in any amount that it considers equitable"); R.C. 505.38(A) (in each township or fire district that has a fire department, the board of township trustees "shall provide for the employment of such fire fighters as it considers best, and shall fix their compensation"); R.C. 505.75(C) (the board of township trustees "may create, establish, fill, and fix the compensation of the position of township building inspector"); R.C. 507.021 (the board of township trustees "may employ such number of persons as it finds necessary to provide stenographic and clerical assistance to the township clerk or deputy clerk"); R.C. 509.01 (the board of township trustees may designate any qualified persons as police constables, and may pay each such constable, from the general funds of the township, "such compensation as the board by resolution prescribes for the time actually spent in keeping the peace, protecting property, and performing duties as a police constable").

Authority to fix the compensation of certain township officers has also been granted a board of township trustees. *See, e.g.*, R.C. 505.031 (the board of township trustees may appoint a township administrator, "who shall hold office at the pleasure of the board," and such board "shall fix the salary of the township administrator and cause the same to be paid"); R.C. 505.38(B) (in each township not having a fire department, the board of township trustees shall appoint a fire prevention officer, and may appoint one or more deputy fire prevention officers; the board "may fix such compensation for the fire prevention officer and his deputies as it considers best"); R.C. 507.02 (the board of township trustees shall, by resolution, adjust and determine the compensation of the township clerk and deputy township clerk, but the total compensation of both the clerk and any deputy clerk shall not exceed the sums fixed by R.C. 507.09 (fee and compensation of clerk) in any one year); R.C. 519.13 (in any township that adopts zoning regulations the board of township trustees shall appoint a township board of zoning appeals of five members, who "may be allowed their expenses, or such compensation, or both, as the board of township trustees may approve and provide").

³ Because you have not indicated otherwise, I presume that the board of township trustees in question contemplates making these reimbursements apart from any contractual provisions that appear in the health care insurance policies purchased by the board under R.C. 505.60(A). As suggested in 1982 Op. Att'y Gen. No. 82-076 at 2-210, a different result might obtain if the reimbursements were to be made pursuant to the terms of the health care insurance policies themselves. *See also* 1981 Op. Att'y Gen. No. 81-069. For the purpose of this opinion, however, I find it unnecessary to make a conclusive determination with respect to that issue.

Certainly, implicit in the power of a board of township trustees to fix the compensation of township officers and employees is the power to increase the amount of that compensation when, in the exercise of a reasonable discretion, the board determines that such action is appropriate or necessary, provided, however, that the exercise of that authority is not limited or otherwise restricted by complementary statutory provisions. Further, such implied authority as is conferred upon a board of township trustees by the foregoing statutes appears to be fairly broad, and unqualified in any particular respect. There is, for example, no language in any of those provisions that describes the circumstances in which a board of township trustees may grant compensation increases, or limits the purposes for which such increases may be granted. One might conclude, therefore, that a board of township trustees may increase the compensation of township officers and employees when those officers and employees experience an increase in the deductible payments they incur in connection with health care insurance policies that are provided by the board under R.C. 505.60.

Nonetheless, I hesitate to advise you that such is the case in this particular situation. You have not indicated whether the board of township trustees has given any consideration to the precise manner in which such a compensation increase would be implemented, or when such an increase would be effective for each individual officer and employee. I am able to discern only one method, however, by which such a proposal may be implemented that would both take into account the economic practicalities of the situation and ensure uniformity of treatment among all the officers and employees in question. In this regard, any salary or compensation increase keyed to deductible payments incurred by an officer or employee must, as a practical matter, occur subsequent to the time when all such payments have been made by each officer and employee, because only at that time will the board of township trustees be able to compute accurately the amount of increase in compensation to be granted to each officer and employee. It is readily apparent, however, that a compensation increase implemented in that fashion is, both in substance and form, a reimbursement to those officers and employees for the deductible payments they have incurred. As I have already concluded, R.C. 505.60(A) does not permit a board of township trustees to make monetary payments to township officers and employees for the purpose of reimbursing them for the deductible payments they incur in connection with health care insurance policies that are procured by the board under that statute. It follows, therefore, that R.C. 505.60(A) does not permit a board of township trustees to grant to township officers and employees compensation increases that operate as reimbursement for deductible payments that those officers and employees incur in connection with health care insurance policies that are procured and paid for by the board pursuant to that statute.⁴

⁴ I wish to emphasize that this conclusion is addressed to only those compensation increases that are keyed specifically to deductible payments actually incurred by township officers and employees, such that the increases, when implemented, operate as reimbursements to those officers and employees for those payments. This conclusion should not be understood as imposing a limitation upon the exercise by a board of township trustees of its statutory authority to grant compensation increases to township officers and employees in such a manner that the increases, when implemented, do not function, either directly or indirectly, as reimbursements for deductible payments that those officers and employees incur in connection with health care insurance policies that are procured and paid for by the board under R.C. 505.60(A), provided, however, that any such compensation increases for township officers are not otherwise prohibited by Ohio Const. art. II, §20, which states that 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." See *State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975) (the strictures of Ohio Const. art. II, §20 apply to township officers); 1981 Op. Att'y Gen. No. 81-099 (same); 1980 Op. Att'y Gen. No. 80-002; 1952 Op. Att'y Gen. No. 1540, p. 469.

It is, therefore, my opinion, and you are advised that a board of township trustees may not make monetary payments or grant compensation increases to township officers and employees as reimbursement for deductible payments those officers and employees incur in connection with health care insurance policies that are procured and paid for by the board pursuant to the terms of R.C. 505.60(A).