

OPINION NO. 2005-031**Syllabus:**

1. A county officer's mid-term change in his level of coverage for health care benefits, which results in a mid-term change in the number of dollars expended by the county on the officer's behalf and an increase in the benefits received by the officer, is not prohibited by Ohio Const. art. II, § 20, so long as such change was not due to a mid-term legislative change to the formula for calculating the officer's compensation, *i.e.*, the officer's change in coverage was to a level that was available to him at the commencement of his term.
2. Because the action taken by a board of county commissioners under R.C. 305.171 in designing a health care plan for county personnel is a type of legislative action, it "must be memorialized by a duly enacted ... resolution and may have prospective effect only." 1982 Op. Att'y Gen. No. 82-006 (syllabus, paragraph four).
3. A county officer who received health insurance benefits at the commencement of his term of office may elect to discontinue receipt of such insurance benefits mid-term, and there is no violation of Ohio Const. art. II, § 20.
4. Article II, § 20 of the Ohio Constitution prohibits a county officer's mid-term change from one health insurance plan to another plan that has different benefits and premiums if the officer's change of plans was due to direct legislative action by the board of county commissioners, in exercising its authority under R.C. 305.171 to provide health care benefits for the county's officers and employees, that changes the formula pursuant to which the county offered health care coverage to the officer at the commencement of his term.
5. In order for a cash payment option offered under R.C. 305.171(G) to be available to a county officer mid-term for purposes of Ohio Const. art. II, § 20, not only must R.C. 305.171(G) have been enacted prior to the commencement of the officer's term, but the county commissioners' adoption of a policy authorizing county appointing authorities to make such payments, and the decision of the appointing authority to offer such payments, as legislative or quasi-legislative actions, must have occurred prior to the commencement of the officer's term.

To: Stephen A. Schumaker, Clark County Prosecuting Attorney, Springfield, Ohio

By: Jim Petro, Attorney General, August 22, 2005

You have asked whether various changes in the health care benefits offered

by a county to its officers and employees, if accepted by a county officer during his term of office, constitute in-term changes in compensation that are prohibited by Ohio Const. art. II, § 20. You specifically ask:

1. Is Article II, Section 20 [of the Ohio Constitution] violated if, after a county officer commences a new term and is covered by a specific health insurance plan and pays a specific percentage of the premium, the county officer opts to select a different level of coverage (not a COBRA “qualifying event”), which will result in the officer paying the same percentage, but of a greater or lesser amount than was previously paid, with a greater or lesser level of coverage?

2. Is Article II, Section 20 [of the Ohio Constitution] violated if, after a county officer commences a new term and is covered by a specific health insurance plan and pays a specific percentage of the premium, the county officer voluntarily terminates all health insurance coverage and is covered by no health insurance plan offered by the county?

3. Is Article II, Section 20 [of the Ohio Constitution] violated if, after a county officer commences a new term and is covered by a specific health insurance plan, the county elects not to continue to offer that plan, which results in the county officer having to choose a plan that offers a different level of coverage (greater or lesser) and requires the county officer to pay the same percentage of the resulting premium, the amount of which will be greater or lesser than the amount previously paid by the county officer?

4. Is Article II, Section 20 [of the Ohio Constitution] violated if, after a county officer commences a new term and is covered by a specific health insurance plan, the county is unable to obtain an identical or equivalent plan, which results in the county officer having to choose a plan that offers a different level of coverage (greater or lesser) and requires the county officer to pay the same percentage of the resulting premium, the amount of which will be greater or lesser than the amount previously paid by the county officer?

5. Is Article II, Section 20 [of the Ohio Constitution] violated if, after a county officer commences a new term and is covered by a specific health insurance plan and pays a specific percentage of the premium, the county officer seeks to participate in a newly created cash opt-out program, as permitted by [R.C. 305.171(G)]?

6. Is Article II, Section 20 [of the Ohio Constitution] violated if, after a county officer commences a new term, the county officer makes a change to his or her health insurance coverage that is a “qualifying event” under COBRA?

Before addressing your specific questions, we must briefly examine the gen-

eral operation of Ohio Const. art. II, § 20 and its application to a county's provision of health insurance benefits for its officers.¹

Article II, Section 20 of the Ohio Constitution and Health Insurance Benefits

Article II, § 20 of the Ohio Constitution declares 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.) Over the past thirty years, the courts have taken a variety of approaches to resolving the question whether changes in an officer's salary or compensation violate the terms of Ohio Const. art. II, § 20.

¹ Two of your questions refer to changes in an officer's health insurance as COBRA “qualifying events.” We assume that your questions refer to 29 U.S.C.A. § 1161(a) and related provisions that require, with limited exceptions, that “[t]he plan sponsor of each group health plan shall provide, in accordance with this part, that each *qualified beneficiary who would lose coverage under the plan as a result of a qualifying event* is entitled, under the plan, to elect, within the election period, continuation coverage under the plan.” (Emphasis added.) See generally 29 U.S.C.A. § 1163 (defining a “qualifying event” as meaning, “with respect to any covered employee, any of [certain enumerated] events which, *but for the continuation coverage required under this part, would result in the loss of coverage of a qualified beneficiary,*” (emphasis added), including, among other things, the death, termination of employment, or divorce of a “covered employee,” and a dependent child's ceasing to be a dependent child); 29 U.S.C.A. § 1167 (2) (defining “covered employee” as meaning, in part, “an individual who is (or was) provided coverage under a group health plan by virtue of the performance of services by the individual for 1 or more persons maintaining the plan”); 29 U.S.C.A. § 1167(3) (defining a “qualified beneficiary” as meaning, in part, “with respect to a covered employee under a group health plan, any other individual who, on the day before the qualifying event for that employee, is a beneficiary under the plan,” such as a spouse or dependent child).

Because of the diversity of events that constitute “qualifying events,” and the corresponding variations in the meaning of the term “qualified beneficiary,” see, e.g., 29 U.S.C.A. § 1167(3)(B) (special rule for terminations and reduced employment); 29 U.S.C.A. § 1167(3)(C) (special rules for retirement), it is not possible to characterize all “qualifying events” in the same manner for purposes of determining whether insurance changes caused by such events are or are not prohibited by Ohio Const. art. II, § 20. Moreover, it is not clear that the occurrence of each or any “qualifying event” would necessarily cause a mid-term change in the health insurance component of a county officer's compensation. Should you have a question about a particular portion of 29 U.S.C.A. § 1161 or related provisions concerning a “qualifying event” as it affects the health insurance component of a county officer's compensation, we will, if requested, address such question in a separate opinion.

One approach has been to focus on the number of dollars spent by a political subdivision in payment to, or on behalf of, one of its officers. This approach is illustrated by *State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975), in which the court was asked whether a township clerk was entitled to receive increased compensation in accordance with a statutory change enacted during the clerk's term of office.² As characterized by the *Artmayer* court, the portion of the clerk's salary statute at issue in that case "gives the clerk additional 'compensation' according to the formula contained therein," 43 Ohio St. 2d at 63. The *Artmayer* court concluded that, "[t]he terms 'salary' and 'compensation,' as used in Section 20, Article II of the Ohio Constitution, are synonymous." The *Artmayer* court then added that, "the terms 'salary' and 'compensation' do not mean a thing when cases of this character are being considered, the whole question being, 'Can the number of dollars payable to an incumbent of a public office be increased by the enactment of a statute during his term of office?'"³ *Id.* at 65 (quot-

² According to 1971-1972 Ohio Laws, Part I, 481 (Am. Sub. S.B. 250, eff. Dec. 30, 1972), the General Assembly amended R.C. 507.09(C), as follows:

In townships having a budget of five thousand dollars or over, the clerk shall receive three per cent of the total expenditures of such township in excess of five thousand dollars in addition to the amount provided under division (B) of this section. No township clerk shall receive compensation in excess of [~~thirty six hundred dollars~~] THE FOLLOWING AMOUNTS in any one calendar year for said services as such clerk:

(1) IN TOWNSHIPS HAVING A BUDGET OF FROM FIVE THOUSAND TO TWO HUNDRED THOUSAND DOLLARS, FOUR THOUSAND DOLLARS;

(2) IN TOWNSHIPS HAVING A BUDGET OF FROM TWO HUNDRED THOUSAND TO THREE HUNDRED FIFTY THOUSAND DOLLARS, FIVE THOUSAND DOLLARS;

(3) IN TOWNSHIPS HAVING A BUDGET OF THREE HUNDRED FIFTY THOUSAND DOLLARS OR OVER, SIX THOUSAND DOLLARS. (Omitted language stricken; new language in uppercase letters.)

Thus, the statutory amendment addressed in *State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975), increased the maximum salary a township clerk could receive per year in townships with annual budgets of over five thousand dollars.

³ The *Artmayer* court's analysis was adopted by 1980 Op. Att'y Gen. No. 80-002 (overruled, in part, by 1983 Op. Att'y Gen. No. 83-036 and 1981 Op. Att'y Gen. No. 81-099), which concluded in paragraph six of the syllabus: "The amount which a public officer who is subject to Ohio Const. art. II, § 20, ... is entitled to have expended upon his behalf for medical or life insurance coverage is to be determined by reference to the amount payable or expended on the date the term of such of-

ing *State ex rel. Boyd v. Tracy*, 128 Ohio St. 242, 253, 190 N.E. 463 (1934), a case involving the analogous prohibition in Ohio Const. art. II, § 31 against in-term changes in compensation for members and officers of the General Assembly).

The following year, the court in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976), applied the terms of Ohio Const. art. II, § 20 to a county's payment of health insurance premiums on behalf of its officers pursuant to R.C. 305.171. The *Parsons* court concluded, in part, that "payments for [fringe] benefits may not constitute 'salary,' in the strictest sense of that word, but they are compensation.... The payments made in this case constitute 'compensation' within the meaning of Section 20 of Article II, and therefore such payments could not be made after the commencement of the term for which a county official has been elected or appointed." 46 Ohio St. 2d at 391 (emphasis added). Because the county commissioners had not authorized payment for the officers' health insurance prior to the commencement of the officers' terms, the *Parsons* court concluded that Ohio Const. art. II, § 20 prohibited the county from paying the premiums for such insurance on behalf of any county officer through the end of the term the officer was serving at the time the commissioners adopted the resolution authorizing the county's purchase of health insurance on behalf of its officers and employees.

Other authorities have focused on the nature of the benefit being received by the officer, rather than on the payments being made from the public treasury. For example, following the *Artmayer* and *Parsons* cases, the Franklin County Court of Appeals in *Collins v. Ferguson*, No. 80AP-245, 1980 Ohio App. Lexis 12570 (Ct. App. Franklin County July 22, 1980), concluded that an increase in the cost of a county officer's health insurance without a corresponding expansion in coverage did not constitute an increase in compensation prohibited by Ohio Const. art. II, § 20. One of the stipulated facts in the *Collins* case was that, prior to the commencement of its officers' terms, the county had a policy of paying one hundred percent of the officers' health insurance premiums. The *Collins* court distinguished the *Parsons* case on the basis that in *Parsons*, the officers had already begun their terms of office when the legislation authorizing the officers to begin receiving health insurance benefits was passed, whereas in *Collins*, the officers were already receiving insurance benefits when the increase in premium occurred. In affirming the lower court's finding that the county's payment of the increased cost of the officer's insurance benefits did not violate Ohio Const. art. II, § 20, the *Collins* court stated, "law, justice and common sense dictate the correctness of the judgment of the Common Pleas Court. To find otherwise would lead to countless quagmires of legal absurdities." 1980 Ohio App. Lexis 12570 at *5. The *Collins* court did not, however, address the aspect of *State ex rel. Parsons v. Ferguson*, finding that the county's payment of insurance premiums on behalf of county officers, rather than

officeholder commences." See also, e.g., 1978 Op. Att'y Gen. No. 78-018 (syllabus) ("Article II, § 20, Ohio Constitution prohibits any increase in *per diem* payments to a school board member resulting from the enactment of Am. Sub. S.B. No. 248 where such member held office prior to the effective date of that act. (1965 Op. Att'y Gen. No. 65-206 overruled)").

the insurance benefits themselves, was the compensation to the officers for purposes of Ohio Const. art. II, § 20.⁴

Soon after, in *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983), the Ohio Supreme Court took a different approach to answering the question whether a change in a municipal court clerk's compensation mid-term is prohibited by Ohio Const. art. II, § 20. Under the *Schultz* court's approach, if direct legislative action taken during the officer's term caused a change in the officer's compensation, the application of such change to the officer is prohibited.

The situation addressed by the *Schultz* court involved the operation of R.C. 1901.31, which, prior to the municipal court clerk's taking office, fixed the clerk's salary at eighty-five percent of the salary of the municipal court judge, with the limitation that the salary of the municipal court clerk could not exceed that of the county's clerk of courts. As dictated by then R.C. 1901.31, the municipal court clerk in *Schultz* had been unable to be paid the full eighty-five percent of the municipal judge's salary because that sum exceeded the statutorily prescribed salary of the county's clerk of courts. During the municipal court clerk's term, however, the General Assembly increased the statutory salary schedules for the counties' clerks of court. The municipal court clerk then requested that his salary be increased to the newly established level of the clerk of court's salary, which remained less than eighty-five percent of the municipal judge's salary.

In finding that the municipal court clerk was entitled to receive a mid-term salary increase due to the amendment of the statute establishing the salaries of clerks of courts of common pleas, the *Schultz* court explained:

A close examination of Section 20, Article II discloses that the prohibition of the section is directed towards a *direct legislative adjustment of the formula* used in calculating the salary of a clerk....

....

What the General Assembly did was change the provisions of R.C. 325.08, the standard used for calculating the salary of a county clerk

⁴ Although the court in *Collins v. Ferguson*, No. 80AP-245, 1980 Ohio App. Lexis 12570 (Ct. App. Franklin County July 22, 1980), focused on the benefits received by the officer in determining whether a prohibited in-term increase had occurred, the same result could have been reached under the formula analysis later adopted by the court in *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983), a discussion of which follows.

Based upon the *Collins* case, 1981 Op. Att'y Gen. No. 81-099 concluded in the syllabus, that: "An increase in the cost of the insurance coverage furnished to elected township and county officers, without a corresponding increase in the extent of the insurance benefits, is not an in-term increase in compensation prohibited by Ohio Const. art. II, § 20. (1980 Op. Att'y Gen. No. 80-002, overruled in part; 1976 Op. Att'y Gen. No. 76-058 overruled.)"

of courts. This change had an indirect effect on the salary of a municipal clerk in those areas where the county clerk's salary was a ceiling limit on the municipal clerk's pay. The change in R.C. 325.08 was in no way a change in the formula used to fix the compensation of a municipal clerk. Thus, it was not a change which, by the provisions of the Ohio Constitution, could not be given to municipal clerks while in term.

.... Where no intent to provide an in-term salary increase is found in a legislative act, the mere fact that such an increase is an incidental result of the act does not render the increase unconstitutional pursuant to the terms of Section 20, Article II of the Ohio Constitution. As this court held in *State, ex rel. Mack, v. Guckenberger* (1942), 139 Ohio St. 273 [22 O.O. 311], in paragraph three of the syllabus:

“A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during his term by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court ‘shall not be diminished or increased during his term of office.’”

6 Ohio St. 3d at 134 (emphasis added).

The *Schultz* court then summarized its test for determining whether a change in an officer's compensation is or is not prohibited by Ohio Const. art. II, § 20, as follows:

When a statute setting forth the formula for the compensation of an officer is effective before the commencement of the officer's term, any salary increase which results from a change in one of the factors used by the statute to calculate the compensation is payable to the officer. Such increase is not in conflict with Section 20, Article II of the Constitution when paid to the officer while in term.

Section 20, Article II of the Constitution forbids the granting of in-term salary increases to officers when such changes are the result of direct legislative action on the section(s) of the Revised Code which are the basis of the officers' salaries.

Id. at 135.

Finding that the municipal court clerk's salary had been fixed pursuant to a statutory “formula” before the commencement of his term, the *Schultz* court concluded that a change in salary due to a mid-term change in one of the variables in that formula was not a change in compensation prohibited by Ohio Const. art. II, § 20, because such change was not the result of “a direct legislative adjustment of the formula,” *id.* at 134, used in calculating such compensation. Thus, in those situ-

ations in which an officer's compensation, or a component thereof, is determined according to a formula fixed prior to the commencement of the officer's term, Ohio Const. art. II, § 20 does not prohibit an in-term change in the officer's compensation in accordance with the formula, so long as such change is not due to direct legislative action that changes the formula.

Legislative Action in Providing Health Care Benefits for County Officers

Through the enactment of R.C. 305.171, the General Assembly has authorized boards of county commissioners, in accordance with the terms of that statute, to fix the health care benefit component of the compensation of county personnel.⁵ As explained in 2000 Op. Att'y Gen. No. 2000-043 at 2-261, "Ohio Const. art. II,

⁵ R.C. 305.171 establishes numerous options available to a board of county commissioners in designing health care benefits for county personnel, in pertinent part, as follows:

(A) The *board of county commissioners* of any county may contract for, purchase, or otherwise procure and pay all or any part of the cost of group insurance policies that may provide benefits including, but not limited to, hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, or prescription drugs, and that may provide sickness and accident insurance, group legal services, or group life insurance, or a combination of any of the foregoing types of insurance or coverage for county officers and employees and their immediate dependents from the funds or budgets from which the officers or employees are compensated for services, issued by an insurance company.

(B) The board also may negotiate and contract for any plan or plans of health care services with health insuring corporations holding a certificate of authority under [R.C. Chapter 1751], provided that each officer or employee shall be permitted to do both of the following:

(1) Exercise an option between a plan offered by an insurance company and such plan or plans offered by health insuring corporations under this division, on the condition that the officer or employee shall pay any amount by which the cost of the plan chosen by such officer or employee pursuant to this division exceeds the cost of the plan offered under division (A) of this section;

(2) Change from one of the plans to another at a time each year as determined by the board.

....

(D) The board of trustees of a jointly administered trust fund that receives contributions pursuant to collective bargaining agreements entered into between the board of county commissioners of any county and a collective bargaining representative of the employees of the county

§ 20 applies to compensation increases approved by subordinate bodies to whom the General Assembly has delegated the authority to fix compensation.” Thus, the county commissioners’ authority to act under R.C. 305.171 is also limited by the

may provide for self-insurance of all risk in the provision of fringe benefits, and may provide through the self-insurance method specific fringe benefits as authorized by the rules of the board of trustees of the jointly administered trust fund. The fringe benefits may include, but are not limited to, hospitalization, surgical care, major medical care, disability, dental care, vision care, medical care, hearing aids, prescription drugs, group life insurance, sickness and accident insurance, group legal services, or a combination of any of the foregoing types of insurance or coverage, for employees and their dependents.

(E) The board of county commissioners may provide the benefits described in divisions (A) to (D) of this section through an individual self-insurance program or a joint self-insurance program as provided in [R.C. 9.833].

(F) When a board of county commissioners offers health benefits authorized under this section to an officer or employee of the county, the board may offer the benefits through a cafeteria plan meeting the requirements of section 125 of the “Internal Revenue Code of 1986,” 100 Stat. 2085, 26 U.S.C.A. 125, as amended, and, as part of that plan, may offer the officer or employee the option of receiving a cash payment in any form permissible under such cafeteria plans. A cash payment made to an officer or employee under this division shall not exceed twenty-five per cent of the cost of premiums or payments that otherwise would be paid by the board for benefits for the officer or employee under a policy or plan.

(G) The board of county commissioners may establish a policy authorizing any county appointing authority to make a cash payment to any officer or employee in lieu of providing a benefit authorized under this section if the officer or employee elects to take the cash payment instead of the offered benefit. A cash payment made to an officer or employee under this division shall not exceed twenty-five per cent of the cost of premiums or payments that otherwise would be paid by the board for benefits for the officer or employee under an offered policy or plan.

(H) No cash payment in lieu of a health benefit shall be made to a county officer or employee under division (F) or (G) of this section unless the officer or employee signs a statement affirming that the officer or employee is covered under another health insurance or health care policy, contract, or plan, and setting forth the name of the employer, if any, that sponsors the coverage, the name of the carrier that provides the coverage, and the identifying number of the policy, contract, or plan. (Emphasis added.)

terms of Ohio Const. art. II, § 20. *See State ex rel. Parsons v. Ferguson* (Ohio Const. art. II, § 20 prohibited a county from paying the premiums for health insurance benefits for its officers when the resolution authorizing such payment had not been enacted until after the commencement of the officers' terms); *State ex rel. Holmes v. Thatcher*, 116 Ohio St. 113, 155 N.E. 691 (1927) (finding that Ohio Const. art. II, § 20 applied to salaries of municipal court judges which, at that time, were set by the board of county commissioners and city council within ranges established by the General Assembly); 1980 Op. Att'y Gen. No. 80-050 at 2-206 (in enacting a statute that authorizes another body to set the compensation of officers who are subject to Ohio Const. art. II, § 20, "the General Assembly may not delegate more power than it possesses," and the compensation-fixing body is subject to the same constitutional limitations as is the General Assembly in the setting of such compensation).

In addition, because the action taken by a board of county commissioners under R.C. 305.171 in designing the health care options for county personnel is a type of legislative action,⁶ it "must be memorialized by a duly enacted ... resolution and may have prospective effect only." 1982 Op. Att'y Gen. No. 82-006 at 2-19 (citations omitted).⁷ It is the county commissioners' resolution authorizing benefits under R.C. 305.171, therefore, that establishes the health care benefits available to county personnel and determines the choices that are available to a county officer at the commencement of his term. The language of the resolution in effect at the commencement of an officer's term also determines whether such choices are offered pursuant to a formula. In the event the county's health care options are made available pursuant to a formula, the resolution also establishes the elements of such formula. The resolution setting forth the county's health care options under R.C. 305.171 must, therefore, be the reference point for determining whether a mid-term change in an officer's health care benefits has occurred, and whether such change is prohibited by Ohio Const. art. II, § 20.

Application of Ohio Const. art. II, § 20 to Specific Changes in County Officers' Health Care Benefits Made By County Commissioners under R.C. 305.171

You have not informed us of the specific terms upon which the county made health care benefits available to its officers at the commencement of their terms. It is not possible, therefore, for us to determine whether the types of changes you describe in your letter are changes prohibited by Ohio Const. art. II, § 20. In addition, any such determination requires resolution of numerous questions of fact, *e.g.*, whether the county's health care options were offered pursuant to a "formula,"

⁶ *See, e.g., State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917) (characterizing the power to set the compensation of county officers as "legislative"); *State ex rel. Montgomery v. Rogers*, 71 Ohio St. 203, 219, 73 N.E. 461 (1905) (same).

⁷ For ease of discussion, this opinion will refer to the health care choices selected by the county commissioners for county personnel under R.C. 305.171 as the county's health care options.

and, if so, what components make up that formula. These kinds of factual questions cannot be resolved by means of an opinion of the Attorney General.⁸ We will, instead, attempt to address your questions in a more general manner to assist you in your assessment of whether specific changes in a county officer's health care benefits are prohibited by Ohio Const. art. II, § 20.

Your first question asks whether Ohio Const. art. II, § 20 is violated if, after a county officer commences a new term and is covered by a specific health insurance plan and pays a specific percentage of the premium, the county officer opts to select a different level of coverage, *e.g.*, single or family, which will result in the of-

⁸ A number of Attorney General opinions that have examined the question of changes in officers' health care benefits in relation to the prohibition in Ohio Const. art. II, § 20 against in-term changes in compensation have concluded, in reliance upon *Collins v. Ferguson* and 1981 Op. Att'y Gen. No. 81-099, that a change in the premium payable for an officer's health insurance benefits, without a change in the health care coverage provided, is not a prohibited in-term change in compensation. *See, e.g.*, 2004 Op. Att'y Gen. No. 2004-004 (syllabus, paragraph five) (if the cost of a county officer's health care coverage increases mid-term without any change in the coverage provided, Ohio Const. art. II, § 20 does not prohibit the county from paying the increased cost); 1989 Op. Att'y Gen. No. 89-003 (syllabus, paragraph two) (the county's payment of an increase in the premium cost of a group insurance policy for a county officer does not violate the prohibition of Ohio Const. art. II, § 20, "provided that the benefits procured are unchanged, and the total percentage of the entire premium cost paid by the board of county commissioners remains the same"). Although not always expressly stated in these opinions, the assumption is that the "formula" defining the officers' health care benefit options at the commencement of their terms included the county's payment of a percentage of each premium, such percentage remaining unchanged during the officers' terms.

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

ficer paying the same percentage, but of a greater or lesser amount than was previously paid, with a greater or lesser level of coverage.

Example 1: Let us assume that, at the commencement of the officer's term, the county offered coverage under Plan A offered by Company 1, which had a \$100 per month premium for single coverage and a \$200 per month premium for family coverage, or under Plan B offered by Company 2, which had a \$105 per month premium for single coverage and \$225 per month premium for family coverage. The county also offered to pay fifty percent of the officer's premium for either single or family coverage, regardless of which plan the officer chose. At the beginning of his term, the officer chose single coverage under Plan A. Accordingly, the county paid \$50 per month for the officer's health care coverage.

Let us also assume that, during his term of office, the officer elected to receive family coverage under the same policy, which would require the county to pay \$100 per month on behalf of the officer. According to the terms under which the county offered insurance coverage to the officer at the commencement of his term, *i.e.*, the formula, the county was obligated to pay fifty percent of the premium for either level of coverage under either plan. Thus, although the county must spend \$50 more per month on behalf of the officer, such a change is not prohibited by Ohio Const. art. II, § 20, because the change in dollars spent and benefits received is attributable to the officer's decision to select a different option from among the choices available to him at the commencement of his term, rather than to a legislative action that adjusted the formula, *i.e.*, adjustment of the level of coverage or the percentage of the premium paid.

Example 2: Again, let us assume that at the commencement of an officer's term, the county offered the same plans as in *Example 1*, with the same premiums as described in that example. Unlike *Example 1*, however, the county offered to pay the full premium for single coverage under Plan A or Plan B, but only seventy-five percent of the premium under either plan for family coverage. If we assume that the officer originally chose single coverage under Plan B, the county paid \$105 per month on his behalf. If the officer then changed mid-term to family coverage, the county would be required to pay \$168.75 per month on his behalf. Again, although the number of dollars expended by the county on behalf of the officer has increased, the change is not a prohibited in-term change in compensation because the change results from the officer's election to receive a different level of insurance coverage on terms that were available to him at the commencement of his term. The formula pursuant to which the county made health care benefits available to the officer at the commencement of his term was not changed.

Example 3: For purposes of this example, let us assume that, at the commencement of the officer's term, the county offered the same plans as in *Example 1*, with the same premiums as described in that example. Also, at the commencement of the officer's term, the county offered to pay the full premium for single coverage under Plan A or Plan B, but only seventy-five percent of the premium for family coverage under either plan. During the officer's term, however, the county changed its insurance options, offering to pay only fifty percent of the premium for single or

family coverage under either plan. Let us also assume that the officer elected single coverage under Plan A at the commencement of his term. If, after the county's new offer of health care benefits is in place, the county officer elects mid-term to change to family coverage, the county's payment of fifty, rather than seventy-five, percent of the premium for family coverage for the officer would be a prohibited in-term decrease in the officer's compensation, because the county commissioners' action in decreasing the percentage of the family coverage premium payable by the county was caused by a change in the formula pursuant to which the officer was entitled to health care benefits at the commencement of his term. In order to comply with the requirements of Ohio Const. art. II, § 20, the county must allow the officer to change his level of coverage, as the original formula allowed him to do, and must pay for family coverage at the rate of seventy-five percent, the percentage in effect at the commencement of the officer's term.

Example 4: We will assume that the same insurance plans, with the same premiums as described in *Example 1*, are available to a county officer at the commencement of his term. In this case, however, the county offers to pay for its officers the same percentage of the premium it pays for its employees, as determined by a collective bargaining agreement covering such employees, which agreement specified at the commencement of the officer's term that the county pays fifty percent of single coverage and forty percent of family coverage. The county's offer of insurance at the commencement of the officer's term specified that it would pay the percentage as explained above, but only for the plan selected by the bargaining unit. At the commencement of his term, the officer chose single coverage under Plan B, the plan selected by the bargaining unit, and in accordance with the employees' collective bargaining agreement, the county paid fifty percent of the officer's premium for single coverage. During the officer's term, however, the bargaining unit's new contract called for employee coverage under Plan A with the county paying one hundred percent of the premium for either single or family coverage. In this instance, the formula established by the county commissioners included payment at the rate of fifty percent for insurance premiums for single coverage, as determined by a variable, the terms of a collective bargaining entered into with its employees. Application of the new terms of the collective bargaining agreement to the formula established at the commencement of the officer's term is not a change in the formula itself. Accordingly, if the officer chose mid-term to change to family coverage under Plan A, the county's payment of one hundred percent of the premium for family coverage under Plan A on the officer's behalf would not be prohibited by Ohio Const. art. II, § 20, because the change did not result from a change in the formula, but, instead, from the officer's election to change to a different level of coverage that was available at the commencement of his term and because of a change in one of the original formula's variables, the terms of the employees' collective bargaining agreement.

In summary, therefore, a county officer's mid-term change in his level of coverage under an insurance plan offered as part of the county's health care options, which results in a mid-term change in the number of dollars expended by the county on the officer's behalf and an increase in the benefits received by the officer, is not

prohibited by Ohio Const. art. II, § 20 so long as such change is not attributable to a mid-term legislative change to the formula used to calculate the officer's compensation, *i.e.*, the officer's change in coverage was to a level of coverage and percentage of premium that was available to him at the commencement of his term.

Officer's Waiver of Insurance Benefits

Your second question asks whether Ohio Const. art. II, § 20 is violated if a county officer, who, at the commencement of his term of office, was covered by a particular health insurance plan and paid a fixed percentage of the premium for such insurance coverage, voluntarily terminates his health insurance benefits during that term. As set forth above, the activity at which the prohibition of Ohio Const. art. II, § 20 is aimed is direct legislative adjustment of the formula used in calculating the compensation of an officer. *Schultz v. Garrett*, 6 Ohio St. 3d at 135. Thus, if a county officer voluntarily elects to discontinue receiving health care insurance from the county as part of his compensation, the decrease in the officer's compensation results not from any action of the General Assembly or of the county commissioners with respect to providing health insurance. As stated in *State ex rel. Hess v. City of Akron*, 132 Ohio St. 305, 7 N.E.2d 411 (1937) (syllabus): "The occupant of a public office may waive part of the established salary thereof," and "[s]uch a waiver is not contrary to public policy."

Because a county's payment of an officer's health insurance premiums is a form of compensation, as is a county's payment of an officer's salary, *State ex rel. Parsons v. Ferguson*, an officer may elect to waive the county's payment for such premiums, and such waiver is not contrary to public policy. *See, e.g.*, 2003 Op. Att'y Gen. No. 2003-027 (syllabus, paragraph one) (stating, in part, "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"); 1980 Op. Att'y Gen. No. 80-002 (syllabus, paragraph seven) ("[a] public officer subject to Ohio Const. art. II, § 20 may participate in duly authorized medical or life insurance programs available to him at the commencement of his term at any point during such term, even though he previously, during that term, declined to participate in such programs"); 1978 Op. Att'y Gen. No. 78-054 (syllabus, paragraph one) ("[a] township trustee may opt to participate in a group health insurance plan paid for in whole, or in part, by the township under R.C. 505.60, during his existing term in office, without violating Art. II, § 20, Ohio Const., even though he had previously declined to participate in the plan, provided that participation in the plan was available to him at the commencement of his term in office"). In answer to your second question, we conclude, therefore, that a county officer who received health insurance benefits at the commencement of his term of office may elect to discontinue receipt of such insurance benefits mid-term, and there is no violation of Ohio Const. art. II, § 20.

Change in Insurance Plans Offered by County

Your third and fourth questions ask whether Ohio Const. art. II, § 20 prohibits a board of county commissioners from discontinuing, in the middle of a county officer's term, the county's participation in a health insurance plan in which

the officer elected to participate at the commencement of his term, if the county elects, instead, to provide a health insurance plan that offers different types or amounts of benefits at a different premium amount, and if the percentage of premium payable by the officer remains unchanged.

Your third question asks us to assume that the county's change in the health insurance plans it will offer county personnel results from the county commissioners' election not to continue to offer that plan. Whether an officer's mid-term change to another insurance plan that may have different types or amount of benefits than the plan he chose at the commencement of his term is a prohibited change in compensation depends upon whether the change in insurance plans constitutes a change in the "formula" or options that were available to the officer at the commencement of his term of office. For example, if the original formula for county health care benefits listed specific plans, levels of coverage, or other aspects of its insurance coverage under R.C. 305.171, the county commissioners' change in any of those specifics works a legislative change upon the formula. If, on the other hand, specific insurance plans, levels of coverage, or other aspects of health insurance coverage were not identified in the original formula pursuant to which health care benefits were offered to the officer at the commencement of his term, then Ohio Const. art. II, § 20 does not prevent the county from applying such changes to an officer mid-term.

Your fourth question asks us to assume the same facts as in question three, except that the county's failure to offer the health insurance plan chosen by an officer at the commencement of his term results from the fact that the policy is no longer available to the county. In such a situation, regardless of the specificity of the original insurance benefit formula offered by the county at the commencement of the officer's term, the unavailability mid-term of the original plan selected by the officer is not attributable to a mid-term change in the formula by the county commissioners. So long as other health insurance plans that were available at the commencement of the officer's term remain available, the officer may choose from among those other plans, regardless of the differences from his originally selected insurance plan, and any changes in the benefits received by the officer or the premium paid on his behalf do not violate Ohio Const. art. II, § 20.

In summary, Ohio Const. art. II, § 20 prohibits a county officer's mid-term change from one health insurance plan to another plan that has different benefits and premiums if the officer's change of plans was a consequence of direct legislative action by the board of county commissioners, in exercising its authority under R.C. 305.171 to provide health care benefits for the county's officers and employees, that changes the formula pursuant to which the county offered health care benefits to the officer at the commencement of his term.

Change from Health Insurance Coverage to Cash Option Benefit

Your fifth question asks whether Ohio Const. art. II, § 20 prohibits a county officer, who at the commencement of his term participated in a health insurance plan for which he paid a fixed percentage of the premium, from terminating his participation in such plan mid-term in order to participate in a "newly-created"

cash opt-out program authorized by the county commissioners under R.C. 305.171(G).⁹

Let us examine the specific provisions of R.C. 305.171(G):

The board of county commissioners may establish a policy authorizing any *county appointing authority* to make a cash payment to any officer or employee in lieu of providing a benefit authorized under this section if the officer or employee elects to take the cash payment instead of the offered benefit. A cash payment made to an officer or employee under this division shall not exceed twenty-five per cent of the cost of premiums or payments that otherwise would be paid by the board for benefits for the officer or employee under an offered policy or plan. (Emphasis added.)

Pursuant to division (G) of R.C. 305.171, the General Assembly has further delegated a portion of its authority with respect to determining the compensation of county officers. Through the enactment of R.C. 305.171(G), the General Assembly has authorized each county's board of commissioners to adopt a policy pursuant to which the county's appointing authorities may offer their officers and employees the option of receiving a cash payment in lieu of health care benefits otherwise provided under R.C. 305.171.¹⁰

You specifically ask whether Ohio Const. art. II, § 20 prohibits a county of-

⁹ Division (G) was added to R.C. 305.171 in 1993-1994 Ohio Laws, Part III, 5106 (Am. Sub. H.B. 213, eff. Oct. 6, 1994).

¹⁰ The General Assembly has not specifically defined the term "appointing authority" for purposes of R.C. 305.171. For purposes of R.C. Chapter 124, however, "appointing authority" means "the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution." R.C. 124.01(D). Elsewhere within the Ohio Revised Code, the General Assembly has used the term "appointing authority" in accordance with its meaning established by R.C. 124.01(D). *See, e.g.*, R.C. 505.05 ("[u]pon notifying the board of township trustees, any appointing authority of a township office or department may establish a program to recognize outstanding employee performance. The program may include, but is not limited to, cash awards, additional paid leave, or other additional benefits as the appointing authority considers appropriate, so long as the costs of the program do not exceed the total amount of compensation fixed by the board of township trustees for the office or department"); R.C. 4111.03(D) (stating, in part, "[a] county appointing authority with the exception of the county department of job and family services may, by rule or resolution as is appropriate, indicate the authority's intention not to be bound by division (B) or (C) of this section, and to adopt a different policy for the calculation and payment of overtime that is embodied in those divisions"). We will assume that the General Assembly has used the term "appointing authority" in R.C. 305.171(G) in accordance with its definition in R.C. 124.01(D).

ficer¹¹ from participating in such a “newly created” cash-in-lieu-of-insurance option authorized in accordance with R.C. 305.171(G). Again, whether a county officer’s mid-term change from participation in a health insurance plan offered by the county to the cash payment option offered under R.C. 305.171(G) violates Ohio Const. art. II, § 20 depends upon whether participation in the latter option was available to the officer at the commencement of his term. In order for a cash payment option offered under R.C. 305.171(G) to be available to a county officer for purposes of Ohio Const. art. II, § 20, not only must R.C. 305.171(G) have been enacted prior to the commencement of the officer’s term, but the county commissioners’ adoption of a policy authorizing county appointing authorities to make such payments, and the decision of the appointing authority to offer such payments, as legislative or quasi-legislative actions, must have occurred prior to the commencement of the officer’s term. *See State ex rel. Parsons v. Ferguson.*

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

1. A county officer’s mid-term change in his level of coverage for health care benefits, which results in a mid-term change in the number of dollars expended by the county on the officer’s behalf and an increase in the benefits received by the officer, is not prohibited by Ohio Const. art. II, § 20, so long as such change was not due to a mid-term legislative change to the formula for calculating the officer’s compensation, *i.e.*, the officer’s change in coverage was to a level that was available to him at the commencement of his term.
2. Because the action taken by a board of county commissioners under R.C. 305.171 in designing a health care plan for county personnel is a type of legislative action, it “must be memorialized by a duly enacted ... resolution and may have prospective effect only.” 1982 Op. Att’y Gen. No. 82-006 (syllabus, paragraph four).
3. A county officer who received health insurance benefits at the commencement of his term of office may elect to discontinue receipt of such insurance benefits mid-term, and there is no violation of Ohio Const. art. II, § 20.

¹¹ Because a county officer may participate in the cash payment option under R.C. 305.171(G) only after the county commissioners have adopted a policy that authorizes county appointing authorities to make such payments and the officer’s appointing authority has authorized that option for its appointed officers and employees, it appears that elected county officers, having no “appointing authorities,” are unable to participate in such a cash payment option. Although Ohio Const. art. II, § 20 applies to both appointive and elective county officers, *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29 (1916) (syllabus, paragraph three), the cash payment option authorized by R.C. 305.171(G) is available only to appointive county officers. The references to county officers in this discussion is limited, therefore, to those holding appointive county offices.

4. Article II, § 20 of the Ohio Constitution prohibits a county officer's mid-term change from one health insurance plan to another plan that has different benefits and premiums if the officer's change of plans was due to direct legislative action by the board of county commissioners, in exercising its authority under R.C. 305.171 to provide health care benefits for the county's officers and employees, that changes the formula pursuant to which the county offered health care coverage to the officer at the commencement of his term.
5. In order for a cash payment option offered under R.C. 305.171(G) to be available to a county officer mid-term for purposes of Ohio Const. art. II, § 20, not only must R.C. 305.171(G) have been enacted prior to the commencement of the officer's term, but the county commissioners' adoption of a policy authorizing county appointing authorities to make such payments, and the decision of the appointing authority to offer such payments, as legislative or quasi-legislative actions, must have occurred prior to the commencement of the officer's term.