Note from the Attorney General's Office:

1980 Op. Att'y Gen. No. 80-002 was overruled in part by 1981 Op. Att'y Gen. No. 81-099.

1980 Op. Att'y Gen. No. 80-002 was overruled in part by 1983 Op. Att'y Gen. No. 83-036.

OPINION NO. 80-002

Syllabus:

1. The provisions of Ohio Const. art. II, §20 prohibit the in-term commencement of payments to procure medical or life insurance benefits on behalf of county and township officers.

2. R.C. 731.07 and R.C. 731.13 prohibit the in-term commencement of payments to procure medical or life insurance benefits on behalf of municipal officers operating under a statutory plan of government. (1972 Op. Att'y Gen. No. 72-059 clarified.)

3. When a city or village charter confers full authority upon the legislative body of a municipality to fix the compensation of municipal officers, that power may be exercised without reference to R.C. 731.07 and R.C. 731.13; the officers of such a municipality may receive the benefit of in-term commencement of premiums for medical or life insurance coverage or the benefit of the increased cost thereof, unless the charter or an ordinance prohibits in-term increases. (1954 Op. Att'y Gen. No. 4322, p. 498 approved and followed.)

4. A statute, resolution, or ordinance authorizing the commencement of payments to secure medical or life insurance benefits on behalf of a public officer subject to Ohio Const. art. II, §20 must be formally adopted and effective prior to the commencement of such officer's term. Any such resolution by a board of county commissioners or board of township trustees must be adopted at a regular or special meeting by a majority of a quorum.

5. An ordinance or resolution authorizing the commencement of payments to secure medical or life insurance benefits on behalf of an officer of a municipal corporation operating under a statutory plan of government must be adopted in accordance with R.C. 731.17, and must be effective at the commencement of such officer's term.

6. The amount which a public officer who is subject to Ohio Const. art. II, §20, R.C. 731.07, or R.C. 731.13 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 officeholder commences.

7. 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 approved and followed.)

8. In the event that the cost of medical or life insurance coverage for a public officer subject to Ohio Const. art. II, §20 should decrease during such officer's existing term, Ohio Const. art. II, §20 requires a direct payment to the officer of the difference between his amount of entitlement and the reduced cost.

9. The legislative body of a county, township, or municipality operating under a statutory plan of government may provide for an escalation in the amount of funds to cover in-term increases in the cost of medical or life insurance for officers of the county, township, or municipality if, but only if: (a) the provision is enacted prior to the commencement of the officerholder's term; (b) the increased funding is automatic and not dependent on any in-term exercise of official discretion; and (c) there is no material alteration in the insurance benefits provided during the officeholder's term (i.e., any increase in premiums is attributable to price increases by the insurer and not to an increase in benefits). Absent such a provision, a county, township, or municipality operating under a statutory plan of government may not use public funds to pay for in-term increases in the cost of medical or life insurance premiums paid on behalf of officers of the county, township, or municipality. (1976 Op. Att'y Gen. No. 76-058 clarified.)

10. The cost of liability insurance primarily geared to the protection of a public officer from liability for official acts does not constitute compensation to the officer for purposes of Ohio Const. art. II, §20.

II. Contributions to the workers' compensation fund, the unemployment compensation fund, and the public employees retirement system made by a public employer on behalf of a public officer pursuant to statutory mandate are not compensation to the public officer for the purposes of Ohio Const. art. II, §20. Amounts withheld from a public officer's salary for the public employees retirement system do constitute compensation to the officer for the purposes of Ohio Const. art. II, §20.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, January 24, 1980

I have before me your request for my opinion concerning the applicability of Ohio Const. art. II, §20, which imposes certain limitations upon in-term changes in the compensation of public officers, to the provision of various fringe benefits or increases in the cost thereof. Your request for my opinion reads as follows:

> In State, ex rel, Parsons v. Ferguson, 46 Ohio St. 2d 389 (1976), the Ohio Supreme Court held that fringe benefits, specifically hospitalization insurance, purchased by a county for county commissioners were "compensation" within the meaning of Section 20 of Article II of the Ohio Constitution. The Court determined that such payments, as compensation, could not be commenced during the existing term of such officers.
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> Shortly thereafter, on August 20, 1976, in 1976 Opinion of the Attorney General No. 76-058, you stated that . . .
>
> > . . . [a]n increase in the cost of health insurance premiums paid on behalf of elected and appointed officers constitutes an increase in salary and is, therefore, prohibited during the existing term of any such officer by Article II, Section 20 of the Ohio Constitution . . .
>
> As a result of these opinions, the Bureau of Inspection and Supervision of Public Offices has routinely audited expenditures by political subdivisions for the purchase of hospitalization insurance for public officers in the course of the biennial examination authorized by Chapter 117, Ohio Revised Code. In the course of such audits, it has become increasingly apparent that unresolved issues with respect to these opinions are causing widespread confusion among public officials. Accordingly, I respectfully request your formal opinion as to the following questions:
>
> 1. Does Article II, Section 20 of the Ohio Constitution prohibit the [in-term] commencement of payments to procure hospitalization insurance on behalf of public officers by:
>   a) a non-charter municipal corporation;
>   b) a charter municipal corporation;
>   c) a county, or
>   d) a township.
>
> 2. Does Article II, Section 20 of the Ohio Constitution prohibit an [in-term] increase in the amount of payments to procure hospitalization insurance on behalf of a public officer by:
>   a) a non-charter municipal corporation;
>   b) a charter municipal corporation;
>   c) a county, or
>   d) a township.

3. If the answer to the first question (above) is in the affirmative, what formal actions are necessary and sufficient with respect to the purchase of insurance on behalf of a public officer prior to commencement of his term of office in order to comply with the provisions of Article II, Section 20 of the Ohio Constitution?

4. If the answer to the second question is in the affirmative, how is the amount to which an officer is entitled to have expended on his behalf for such purposes to be determined?

5. If a public officer at the commencement of his term of office refuses or fails to accept available hospitalization insurance at the expense of the subdivision, does his subsequent acceptance of such coverage constitute an [in-term] increase, contrary to Article II, Section 20 of the Ohio Constitution?

6. If the amount expended on behalf of a public officer for hospitalization insurance should decrease during his term of office, does Article II, Section 20 of the Ohio Constitution require a direct payment to the officer of the amount of such decrease, in order to avoid a reduction in his total compensation?

7. May a board of township trustees, a board of county commissioners, or a village or city council provide by resolution or ordinance adopted prior to the commencement of a term of office for the amount to be expended to procure hospitalization insurance for public officers to increase during such term without contravening Article II, Section 20 of the Ohio Constitution?

8. Where a board of township trustees, or a board of county commissioners acts to procure hospitalization insurance for public officers pursuant to statutory provision, are they in contravention of Article II, Section 20 of the Ohio Constitution, which vests in the General Assembly the authority to fix the compensation of public officers not named in the Constitution?

9. Are the restrictions upon expenditures for the procurement of hospitalization insurance for public officers as "compensation" within the meaning of Article II, Section 20 of the Ohio Constitution equally applicable to expenditures for:
   a) the procurement of life insurance, liability insurance, and other insurance programs authorized for public officers;
   b) P.E.R.S., [Workers'] Compensation, or Unemployment Compensation contributions.

Various constitutional provisions impose limitations upon the compensation to be paid to public officers. Ohio Const. art. II, §31 provides that the members and officers of the General Assembly shall receive a fixed compensation, to be provided by law, and further specifies that no change in their compensation shall take effect during their term of office. Ohio Const. art. III, §19 specifies that the executive officers of the state shall receive a compensation, established by law, which shall

be neither increased nor decreased during the period for which they were elected. The provisions of Ohio Const. art. IV, §14, in effect from 1851 until the Modern Courts Amendment to the Constitution in 1968, similarly provided compensation for judges, and specified that such compensation could not be increased or decreased during their term of office. (The provisions of Ohio Const. art. IV, §6, in effect since 1972, specify that judges of the courts of record shall receive such compensation as may be provided by law, which shall not be decreased during their term of office.) Ohio Const. art. II, §20, provides for the compensation of other officers in the following terms: "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 principal mischief at which each of the foregoing constitutional prohibitions is aimed is the potential for an officeholder to abuse his official powers by bringing improper influence to bear on those who determine his compensation. State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 278, 39 N.E. 2d 840, 843 (1942).

Were I writing on a clean slate, I would opine that in-term increases in premium payments to maintain a pre-existing schedule of insurance benefits would not violate art. II, §20. It seems illogical to contend that a public official is guilty of "nest feathering" when extra dollars are needed to maintain insurance benefits at a particular level. However, I am not writing on a clean slate.

In State ex rel. Artmayer v. Bd. of Trustees, 43 Ohio St. 2d 62, 330 N.E. 2d 684 (1975), the Ohio Supreme Court construed the constitutional prohibition against increasing "the salary of any officer during his current term" (emphasis added) as applying to any form of "compensation." Then, in State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E. 2d 692 (1976), the court construed "compensation" to include fringe benefits such as insurance, as well as take-home pay. Moreover, the Parsons court held that the payments to cover the cost of the insurance (rather than the insurance benefits themselves) constituted "compensation" for purposes of art. II, §20. Hence, any in-term increase in such payments on behalf of an officeholder runs afoul of the constitutional prohibition, to wit:

> Fringe benefits, such as the payments made here, are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check. It is obvious that an office holder is benefitted [sic] and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and only then transmitted to the insurance company. Such payments for fringe benefits may not constitute "salary," in the strictest sense of that word, but they are compensation.
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> In State, ex rel. Artmayer, v. Bd. of Trustees (1975), 43 Ohio St. 2d 62, 330 N.E. 2d 684, the court held in the syllabus that:
>
> "The terms 'salary' and 'compensation' as used in Section 20, Article II of the Ohio Constitution, are synonymous."
>
> 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, 348 N.E. 2d at 694 (emphasis added).

It was also apparent in Parsons that the Supreme Court viewed the in-term commencement of additional insurance premium payments as a violation of the constitutional prohibition:

> Both appellants began their elective terms on January 1, 1973. Since the resolution of the county commissioners authorizing the health insurance plan and approving the payment of premiums was not adopted until January 8, 1973, seven days after the commencement of the appellants' terms of office, the payments should not have been made on their behalf.

46 Ohio St. 2d at 391-392, 348 N.E. 2d at 694.

Under the principles enumerated in Parsons, then, the question of whether the provision of a particular fringe benefit may properly commence during a particular officer's term must be analyzed on the basis of whether providing that benefit results in an in-term increase in the amount of public money expended on behalf of such officer. It is for this reason that, as you noted in your letter, I concluded in 1976 Op. Att'y Gen. No. 76-058 that an increase in the cost of health insurance premiums paid on behalf of an officer subject to art. II, §20 constitutes a prohibited increase in compensation.

Consequently, in response to your first and second questions, I am of the opinion that Ohio Const. art. II, §20 operates to prohibit both the in-term commencement of payments to procure hospitalization insurance for the various public officers subject thereto, and increases in the cost of such payments.

Further examination is, however, necessary to clarify which of the officers enumerated in your first and second questions fall within the scope of art. II, §20. It is settled beyond dispute that township and county officers are subject to the provisions of art. II, §20. See, e.g., State ex rel. Artmayer v. Board of Trustees, supra; State ex rel. DeChant v. Kelser, 133 Ohio St. 429, 14 N.E. 2d 350 (1938); 1977 Op. Att'y Gen. No. 77-083; 1975 Op. Att'y Gen. No. 75-054; 1972 Op. Att'y Gen. No. 72-054; 1969 Op. Att'y Gen. No. 69-034. Due to the operation of Ohio Const. art. XVIII, popularly known as the Home Rule Amendment, the question of whether municipal officers may receive in-term increases in compensation requires further analysis.

As discussed recently in State ex rel. Kohl v. Dunipace, 56 Ohio St. 2d 120, 382 N.E. 2d 1358 (1978), the powers of local self-government, within constitutional limitations, are conferred alike, under the provisions of Ohio Const. art. XVIII, §3, on all municipal corporations, regardless of whether a particular corporation has adopted a charter pursuant to Ohio Const. art. XVIII, §7. See also State ex rel. Bindas v. Andrish, 165 Ohio St. 441, 136 N.E. 2d 43 (1956). In City of Mansfield v. Endly, 38 Ohio App. 528, 176 N.E. 462 (Richland County), aff'd, 124 Ohio St. 652, 181 N.E. 886 (1931), the Court of Appeals for Richland County held that the power to fix the compensation of municipal officers was a power of local self-government within the provisions of art. XVIII, §3. The court concluded that since the compensation of municipal officers was "provided for" by the terms of art. XVIII, §3, municipal officers were not officers within the scope of art. II, §20. See Loux v. City of Lakewood, 120 Ohio App. 415, 193 N.E. 2d 710 (Cuyahoga County 1963) (holding that the enactment of a municipal ordinance increasing the salaries of members of city council during their existing terms of office, pursuant to city charter, does not violate Ohio Const. art. II, §20). However, as explained by one of my predecessors in 1954 Op. Att'y Gen. No. 4322, p. 498, while the power of local self-government may be exercised with or without the adoption of a charter, municipalities may create a form of government which varies from the statutory plan created by the General Assembly pursuant to art. XVIII, §2 only by adoption of a charter. My predecessor was of the opinion that where a municipality has elected, by its failure to adopt a charter, to operate under a statutory form of government, it is subject to the statutory plan of government enacted by the General Assembly. I approve and follow my predecessor's reasoning and concur in his conclusion that the officers of municipalities operating under a statutory plan of government are prohibited from in-term increases in compensation by the terms of R.C. 731.07 and 731.13. This prohibition derives, however, not from art. II, §20, but from the power vested in the General Assembly under Ohio Const. art. XVIII, §2

to create statutory plans of government binding upon municipalities that do not adopt a charter. See Leavers v. City of Canton, 1 Ohio St. 2d 33, 37, 203 N.E. 2d 354, 366-57 (1964) ("An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid when such ordinance is at a variance with a state statute."). In 1972 Op. Att'y Gen. No. 72-059, I concluded that payment of hospitalization benefits for the officers of a non-chartered municipality pursuant to an ordinance adopted after the commencement of the officials' term was improper. I reaffirm that conclusion, but to the extent that Op. Att'y Gen. No. 72-059 implied either that the prohibition applicable to officers of a non-chartered municipality is the result of art. II, §20, or that the prohibition is equally applicable to chartered municipalities, the opinion is hereby modified.

As discussed at length by my predecessor in 1954 Op. Att'y Gen. No. 4322, p. 498, where a city or village charter confers full authority on the municipal council to fix the compensation of municipal officers, that authority may be exercised without regard to the provisions of R.C. 731.07 and R.C. 731.13. I concur in this conclusion. Of course, there may be instances in which a charter conferring such authority on the council specifies that no municipal officer may receive an in-term increase in compensation, but, in such a case, the prohibition would not be a matter of state law. See, e.g., City of Parma Heights v. Schroeder, 26 Ohio Op. 2d 119, 196 N.E. 2d 813 (C.P. Cuyahoga County 1963) (municipal charter requires salaries to be fixed 120 days prior to election and prohibits in-term changes).

In summary, then, I am of the opinion that the provisions of art. II, §20 prohibit the in-term commencement of payments to procure hospitalization insurance on behalf of townships and county officers and, similarly, prohibit payment through public funds of in-term increases in the cost of health insurance benefits. I am also of the opinion that the provisions of R.C. 731.07 and R.C. 731.13 impose a similar prohibition upon officers of municipalities operating under a statutory plan of government, but that where a city or village charter confers full authority on a municipal council to fix the compensation of municipal officers, that power may be exercised without reference to art. II, §20 or R.C. 731.07 and R.C. 731.13. Consequently, it is my opinion that the officers of such a municipality may receive in-term commencement of insurance coverage or the benefit of in-term increases in the costs thereof, unless the charter or an ordinance prohibits in-term increases.

With respect to your third question concerning the formalities necessary to authorize procurement of insurance prior to the commencement of an office-holder's term, it should be noted, as discussed at length in 1978 Op. Att'y Gen. No. 78-047, that, absent a contrary statutory provision, public bodies act only by a majority of a quorum present at a regular or special meeting. While there are numerous examples of statutory provisions that set a quorum higher than a majority of the members of the entire body, the common law rule is that a majority of a quorum, constituted of a simple majority of a collective body, is empowered to act for the body. Because I am aware of no statutory provision which alters this common law rule in respect to boards of township trustees, and because R.C. 305.08 reaffirms the common law rule in respect to boards of county commissioners, I am of the opinion that formal action to purchase insurance for county and township officeholders must be taken by a resolution passed by an affirmative vote of a majority of the quorum. If the insurance is to benefit a particular officeholder, the resolution must be passed prior to the commencement of the officeholder's term. R.C. 731.17 governs the formal action necessary for ordinances and resolutions of municipalities operating under a statutory plan of government. For the procurement of insurance to benefit a particular officer of such a municipality, formal action authorizing procurement of the insurance must be taken in compliance with R.C. 731.17 prior to the commencement of the municipal officer's term. Where such formal action does not occur until after a particular officeholder's term has commenced, I am of the opinion that public funds may not be used to pay the premium for such coverage. As discussed in 1975 Op. Att'y Gen. No. 75-061, however, I am of the opinion that an officeholder may participate in a group insurance program commencing after the beginning of his term if he bears the entire cost of his participation.

Your fourth question relates to the determination of the amount an officeholder is entitled to have expended on his behalf. As discussed above, the decision in Parsons v. Ferguson, supra, makes it clear that an increase in compensation occurs when the amount of money expended on behalf of a public official increases. Consequently, I am of the opinion that the only feasible method of ascertaining the amount an officer is entitled to have expended on his behalf is by reference to the amount payable or expended on behalf of the official on the day his term commences. That sum constitutes a ceiling for the remainder of his term.

I had reason to consider your fifth question, concerning a public officer who does not elect to receive the full compensation due him at the commencement of his term, in 1978 Op. Att'y Gen. No. 78-054. The situation under consideration in that opinion involved a township trustee who did not wish to participate in the insurance coverage available to him at the beginning of his term. It was my conclusion that the purpose of art. II, §20 was in no way thwarted by permitting such an officeholder to later elect to participate in a program available to him at the commencement of his term. For the reasons set forth in 1978 Op. Att'y Gen. No. 78-054, I reaffirm that conclusion, and find no reason not to extend it to all the officeholders subject to the provisions of art. II, §20.

Your sixth question asks whether an officeholder is entitled to a direct payment in the event the cost of insurance coverage should go down during his term. Art. II, §20 prohibits in-term changes in compensation. It is designed to protect an officer against retaliatory action that would decrease his compensation during his term, as well as to prevent the "nest feathering" activity discussed above. State ex rel. Mack v. Guckenberger, supra, at 278, 39 N.E. 2d at 843 ("The purpose of the constitutional inhibition. . .is to make sure that the [officer] and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that. . .[the officer] is protected against the Legislature and the people from decreasing his compensation after his term begins."). While it might be possible to analyze the issue of a decrease in the cost of insurance coverage on the basis of whether the coverage provided to an officeholder has changed in-term, the Supreme Court, in Parsons v. Ferguson, supra, indicated that the issue of in-term changes is to be analyzed not on the basis of coverage provided, but, rather, on the basis of the amount of public funds expended. Applying the reasoning of Parsons set forth above, I am of the opinion that the provisions of art. II, §20 must be regarded as requiring a direct payment to an officer if the cost of insurance coverage is decreased during his term. In the event that the authorizing statute, ordinance, or resolution merely provides for coverage without reference to a fixed amount, I am of the opinion that the amount payable on behalf of an officer, at the commencement of his term, must be used as the reference point for ascertaining any change in compensation. Any increase in cost, under such an authorizing statute, ordinance, or resolution, would be impermissible, and I am of the opinion that the Parsons reasoning requires that to be consistent, any decrease in cost of coverage be offset by direct payment to the officeholder. Parsons clearly views an officeholder's compensation as a "package" having both take-home pay and "fringe" components. So long as the over-all compensation "package" does not change, there can be no objection to insignificant alterations among the various components.

Your seventh question asks whether local legislative bodies may, prior to the commencement of an officeholder's term, provide for an escalating range of funds to cover in-term increases in the cost of hospitalization insurance. The landmark case on this question is State ex rel. Mack v. Guckenberger, supra, which involved a statute which automatically varied the compensation of judges in relation to upward and downward movements in county population. At issue was art. IV, §14 which the Ohio Supreme Court characterized as "almost identical" to art. II, §20. The court began its analysis by noting that the constitutional prohibition did not bar in-term increases in compensation. Instead, it barred in-term legislative action which increased the compensation of incumbent officeholders, to wit:

The command in the Constitution, "shall not be diminished, or

> increased," is in the passive voice, denoting that the subject (in this case compensation) of which it is the predicate, is not to be acted upon. Acted upon by whom and when? Clearly, by the Legislature and during the "term."
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> . . . .
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> The inhibition. . .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.

139 Ohio St. at 279, 282, 39 N.E. 2d at 844-845.

This interpretation is consistent with the public policy underpinnings of the constitutional provision which, said the court, included the need to preclude the officeholder from "using his personal influence or official action to have the Legislature increase his salary." Guckenberger, supra, at 278, 39 N.E. 2d at 843. Obviously, there is no danger of such "nest feathering" activity if the legislative body provides, before the term of the officeholder begins, for automatic in-term increases.

In Guckenberger, the Supreme Court expressly sanctioned such automatic increases so long as they were enacted before the term of the incumbent officeholder began:

> Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that basis, within the contemplation and understanding of both the judge and the people who elect him, is fixed, certain and unchangeable during his term. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits.
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> . . .[T]he weight of authority is that a statute effective before the beginning of the term of a public officer whereby his compensation is automatically increased or diminished during his term by reason of increase or decrease of the population or of the valuation of the taxable property as shown by a later census or tax duplicate, is not in conflict with a constitutional inhibition to the effect that the compensation of such officer shall not be increased or decreased during his term of office.

139 Ohio St. at 282-283, 39 N.E. 2d at 845-846 (emphasis added; court's emphasis omitted).

In State ex rel. Edgecomb v. Rosen, 29 Ohio St. 2d 114, 279 N.E. 2d 870 (1972), the Supreme Court was asked to extend the Guckenberger doctrine to a "piggy-back" situation wherein one officer's compensation varied in accordance with that of a second officeholder. Specifically, a statute [R.C. 1901.31(C)] pegged a municipal court clerk's salary at 85% of the salary of the municipal judge. During the term of the clerk, the judge's salary was raised by an amendment to R.C. 1901.11. The clerk contended that she was entitled to the increase. The Supreme Court disagreed and distinguished Guckenberger:

> [A]ppellee cites State, ex rel. Mack, v. Guckenberger (1942), 139 Ohio St. 273.
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> In that case, the court, as stated on pages 274 and 275, was concerned with the question "* * *whether a statute, effective

> before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during the term by reason of the increase of the population of his county as shown by a federal census effective after the beginning of the term* * *" conflicted with former Section 14, Article IV. . . .
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> . . . .
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> The Guckenberger case and the present case are similar in that in each case the salary is based upon a contingency expressed in a statute, and the statute was not changed after the officeholder assumed office. There is, however, one fundamental difference which makes Guckenberger distinguishable and not controlling in the instant case. There, the happening upon which the salary increase was predicated was a population increase, an event which made the increase automatic, without further legislative action.
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> Here, although appellee's salary is based upon that of the Municipal Court judge, an act of the General Assembly raising the judge's salary was a condition precedent to an increase in appellee's salary. The salary terms in R.C. 1901.31(C), although pre-set themselves, required a legislative act providing an increase in the salary of the Municipal Court judge to, in turn, provide an increase for appellee.
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> By granting an increase to Municipal Court judges the General Assembly concomitantly made a "change" in the compensation of Municipal Court clerks to whom the provisions of R.C. 1901.31(C) were applicable which would "affect" the salary of such clerks. Such a change is prohibited by Section 20, Article II, from affecting the salary "of any officer during his existing term." Therefore, appellee is not now entitled to the increase allowed by R.C. 1901.31(C).

29 Ohio St. 2d at 117-119, 279 N.E. 2d at 872-873 (emphasis added; court's emphasis omitted).

Looking to the policy underpinnings of the constitutional prohibition, Rosen is consistent with Guckenberger. If an officeholder's compensation is in any way dependent on in-term legislative action, there is the danger that the officeholder may use his official position to influence such action.

Applying the foregoing to your seventh question, I conclude that a county, township, or municipality operating under a statutory plan of government may provide for an escalation in the amount of funds to cover in-term increases in the cost of insurance for officers of the county, township, or municipality if, but only if: (a) the provision is enacted prior to the commencement of the officeholder's term; (b) the increased funding is automatic and not dependent on any in-term exercise of official discretion; and (c) there is no material alteration in the insurance benefits provided during the officeholder's term (i.e., any increase in premiums is attributable to price increases by the insurer and not to an increase in benefits).

By way of example, if a city council, prior to the term of the mayor, provided for a monetary ceiling to purchase specified insurance benefits during the mayor's term, the funds paid during the mayor's term could be increased in order to maintain the same coverage if the increased sum were necessitated by the action of the insurance carrier in raising the premium on the policy. The result would be contra, however, if the provision of increased funds were dependent on any in-term exercise of official discretion relative to either the range of benefits to be provided or the precise amount of public funds which would be utilized. In the latter instance, the officeholder would have an opportunity for the "nest-feathering" type of abuse which the Ohio Constitution seeks to prohibit.

Your eighth question asks whether a board of township trustees or board of county commissioners which procures hospitalization for public officers pursuant to statutory authorization therefor acts in contravention of Ohio Const. art. II, §20, which provides that "[t]he general assembly, in cases not provided for in this constitution, shall fix the. . .compensation of all officers." In essence, your question is whether the General Assembly has delegated to the township trustees or county commissioners its authority to fix the compensation of public officers not named in the constitution. Thus, the question is not how the commissioners or trustees may constitutionally exercise the authority granted by R.C. 305.171 and R.C. 505.60, but whether the grant of authority made by those statutes is constitutional. It is not the function of this office to provide you with an opinion on that question. As I stated in 1976 Op. Att'y Gen. No. 76-021 at 2-66: "It [1] is inappropriate for this office to determine the constitutionality of state statutes."

One of my predecessors was faced with a question concerning the constitutionality of a statute in 1962 Op. Att'y Gen. No. 2769, p. 53. He stated, at 55:

> I have been unable to find any decision of a court of this state holding [the statute in question] unconstitutional. I can only advise you, therefore, to proceed under this section on the assumption that it is a valid law. In this regard, your attention is directed to the statement of Jones, J. in The State ex rel. Davis v. Hildebrant, 94 Ohio St., 154 (1916) at page 169 as follows:
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> > "* * * The record in this case discloses that the defendants, as ministerial officers of the state, are refusing to proceed under an act of the general assembly which they claim to be an invalid law. The power of determining whether a law or constitutional provision is valid or otherwise is lodged solely in the judicial department. * * *" (Emphasis added [by my predecessor])

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[1] While I do not deem it appropriate to pronounce upon the constitutionality of state statutes, I would be remiss to totally ignore any significant issue of constitutionality. In this regard, I feel compelled to note the constitutional test which R.C. 305.171 and R.C. 505.60 would have to pass if challenged. The duty enjoined by art. II, §20 "does not require the general assembly to fix the sum or amount which each officer is to receive, but only requires that it shall prescribe or 'fix' the rule by which such compensation is to be determined." Cricket v. State, 18 Ohio St. 9, 21 (1868). Hence, statutes which do not provide any uniform rule for the fixing of compensation, but which, rather, allow the amount that a public officer is to receive to rest upon the judgment or discretion of a governing body, such as a board of county commissioners, are in direct contravention of art. II, §20. Neff v. Board of County Commissioners, 166 Ohio St. 360, 142 N.E. 2d 658 (1957) (statute authorizing county commissioners to determine salary of justices of the peace which does not prescribe standards governing exercise of authority is unconstitutional delegation of legislative authority); State ex rel. Godfrey v. O'Brien, 95 Ohio St. 166, 115 N.E. 25 (1917) (statutory provisions purporting to authorize county auditor or county commissioners to fix salary of county or township officers which provide no uniform rule for determining compensation conflict with Ohio Constitution); State ex rel. Montgomery v. Rogers, 71 Ohio St. 203, 73 N.E. 461 (1905) (act authorizing court of common pleas to fix compensation of county surveyors is unconstitutional delegation of legislative power in violation of Ohio Const. art. II, §20). In light of the foregoing, a judicial pronouncement on the validity of these statutes may be appropriate.

I am, similarly, unaware of any decision of a court of this state which addresses the constitutionality of the statutes which you question. Under a tripartite system of government there is an implied exclusion of each department of government from exercising the functions conferred upon the others. See State ex rel. Montgomery v. Rogers, 71 Ohio St. 203, 73 N.E. 461 (1905). As such, I do not believe it to be within my power to exercise the judicial function of declaring statutes unconstitutional. Moreover, a "regularly enacted statute is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality." 1977 Op. Att'y Gen. No. 77-047 at 2-165. The courts will uphold an enactment of the General Assembly unless it is unconstitutional beyond a reasonable doubt. E.g., State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E. 2d 59 (1955). Therefore, I assume, for purposes of this opinion, that a board of township trustees or a board of county commissioners may act pursuant to statutory provision to procure hospitalization insurance for public officers without contravening Ohio Const. art. II, §20.

Your ninth question asks what forms of insurance coverage provided at public expense would constitute "compensation" for purposes of art. II, §20. In Parsons, the Supreme Court indicated that the principal inquiry was whether the officeholder is "benefitted [sic] and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and only then transmitted to the insurance company." 46 Ohio St. 2d at 391, 348 N.E. 2d at 694. The foregoing suggests that any insurance which (a) the employee might be expected to purchase for himself whether or not he were a public officer, and (b) is useful to him in his purely personal (i.e., non-official) capacity, is part of his compensation package. A fringe benefit is something provided at the expense of the employer and "intended to directly benefit the employee. . . . If the primary purpose in providing the [benefit]. . .is the convenience of the [government]. . .rather than an intention to directly benefit its employees" it does not constitute a fringe benefit, and, thus, does not constitute compensation. 1977 Op. Att'y Gen. No. 77-090 at 2-305. The distinction between benefits which are provided for the employee and those which are provided to meet the needs of the employer is analogous to the "convenience-of-the-employer doctrine" applied to exclude from income for federal income tax purposes certain items of food and lodging provided to an employee by an employer. See Commissioner v. Kowalski, 434 U.S. 77, 84-95 (1977) (discussing the "convenience-of-the-employer doctrine"); Van Rosen v. Commissioner, 17 T.C. 834, 838 (1951) (describing situation in which there was found to be no income to employee as follows: "[T]hough there was an element of gain to the employee, . . .he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of employer's business dominated and controlled. . . . The fact that certain wants and needs of the employees were satisfied was plainly secondary and incidental to the employment.").

On the foregoing basis, payments for medical and life insurance would constitute part of the officer's compensation. Such insurance is highly useful to the officer and his family or heirs in a purely non-public sense, since its primary purpose is to directly benefit the officer or his family or heirs. Moreover, the officer might fairly be expected to purchase these types of insurance whether or not he or she was a public official.

The same is not necessarily true of liability insurance. Where suit is brought against a public officer in his official capacity, the action is, in reality, a suit against the governmental entity itself. See Hutto v. Finney, 437 U.S. 658 (1978); Monell v. Department of Social Services, 436 U.S. 658, 690 nn. 54 & 55 (1978). Liability insurance covering this sort of suit directly benefits the government only, not the official. Insurance which protects an officer in suits brought against him personally, for acts done within the scope of official duties, does insulate the officer's personal assets; however, the primary purpose of such insurance is generally the convenience of government. In the private sector, the cost of liability insurance is normally considered a part of the cost of doing business, see, e.g., R.C. 1701.13(E)(7); Brook, Officers and Directors Liability Insurance, 2 The

Forum 228, 232-33 (1966), and the same would be true in the operation and provision of governmental services to the public. Hence, if liability insurance is primarily geared to protection against liability for official acts, I am of the opinion that it should not be included in the officer's compensation. While the officer's personal financial situation may be insulated from devastation by the insurance, a public officer could not fairly be expected to procure such liability insurance but for his official status. I conclude, accordingly, that the cost of liability insurance primarily geared to the protection of a public officer from liability for official acts does not constitute compensation to the officer for the purposes of Ohio Const. art II, §20.

In the second part of your ninth question, you ask whether a public employer's contributions to the public employees retirement system, the workers' compensation fund, or the unemployment compensation fund should be regarded as "compensation" for purposes of art. II, §20. The dispositive issue, in my opinion, is whether these contributions are fringe benefits to the public officer. If these contributions are fringe benefits, they fall within the purview of art. II, §20 under the reasoning of Parsons v. Ferguson, supra.

Applying this test to a public employer's contributions to the workers' compensation fund and the unemployment compensation fund, I am unable to conclude that such contributions are "compensation" to the public officer. Such contributions are statutorily required to be paid by virtually all employers, private as well as public. See R.C. 4141.01 (definition of "employer" for the purposes of the unemployment compensation statutes); R.C. 4123.01 (definition of "employer" for the purposes of the public employees retirement system). The potential benefit that may accrue to an individual under these laws does not differ depending upon the employer involved. More importantly, the entire purpose of the statutorily mandated workers' compensation contributions is not to add to the compensation of the individual employee on whose behalf contributions are made. Instead, it is a recognition that work-related injuries are unavoidable in an industrialized society; that seldom does the average worker have accumulated savings sufficient to cover the cost of major medical problems; and that, absent the creation of a risk-spreading fund, the state itself might end up absorbing most of the cost of industrial accidents. See Malone and Plant, Workman's Compensation (1963). In short, mandatory workers' compensation contributions protect the state as much as the individual and cannot fairly be viewed in the same category as take-home pay under traditional notions of an employee's compensation package. Such payments are not, therefore, properly viewed as fringe benefits, and, consequently, are not within the purview of art. II, §20.

I turn now to contributions to the public employees retirement system (P.E.R.S.). Part of the contribution comes from the employee's or officer's salary. The salary itself is the "compensation" and part of this compensation is withheld to make the P.E.R.S. contribution. So long as the salary is not increased during the term of the officeholder, it can hardly be said that the officer's compensation is being increased because more of his salary is withheld from his personal disposal. Thus, the salary constitutes the compensation for purposes of Ohio Const. art II, §20, regardless of the amount withheld for P.E.R.S.

The other component of the P.E.R.S. contribution is the employer's contribution. Like workers' compensation, it is mandated by state law. Similarly, the legislative purpose in requiring such contributions is quite divorced from traditional notions regarding an employee's compensation. The essential purpose is to force an employee to save toward his or her retirement. As with workers' compensation, this helps to prevent the employee from becoming a financial ward of the state. Unlike an employee's contribution toward P.E.R.S., which may be recovered by the employee under R.C. 145.40 if he leaves public service prior to death or retirement, or which will provide the basis for determining the amount of retirement benefits received under R.C. 145.33 or 145.34, the employer's contribution does not accrue directly to each employee. See R.C. 145.48, 145.51. Rather, like workers' compensation and unemployment benefits, the P.E.R.S.

contributions made by employers are intended for the general benefit of employees as a group. Finally, when one looks to the purposes underlying art. II, §20, it seems extraordinarily doubtful that any officeholder could use his position to exert improper influence in an effort to alter the state-wide contribution rate so as to "feather his own nest" or that the rate would be altered as a punitive measure directed at any one officeholder. Contributions made to a retirement system on behalf of an employee may, in some circumstances, be considered a sort of fringe benefit or compensation to the employee. See, e.g., 1979 Op. Att'y Gen. No. 79-001; 1978 Op. Att'y Gen. No. 78-049. I do not find, however, that employers' P.E.R.S. contributions, made pursuant to statutory mandate, constitute compensation for purposes of the prohibition of Ohio Const. art. II, §20 against changes in compensation during an officer's term.

In summary, it is my opinion, and you are advised, that:

1. The provisions of Ohio Const. art. II, §20 prohibit the in-term commencement of payments to procure medical or life insurance benefits on behalf of county and township officers.

2. R.C. 731.07 and R.C. 731.13 prohibit the in-term commencement of payments to procure medical or life insurance benefits on behalf of municipal officers operating under a statutory plan of government. (1972 Op. Att'y Gen. No. 72-059 clarified.)

3. When a city or village charter confers full authority upon the legislative body of a municipality to fix the compensation of municipal officers, that power may be exercised without reference to R.C. 731.07 and R.C. 731.13; the officers of such a municipality may receive the benefit of in-term commencement of premiums for medical or life insurance coverage or the benefit of the increased cost thereof, unless the charter or an ordinance prohibits in-term increases. (1954 Op. Att'y Gen. No. 4322, p. 498 approved and followed.)

4. A statute, resolution, or ordinance authorizing the commencement of payments to secure medical or life insurance benefits on behalf of a public officer subject to Ohio Const. art. II, §20 must be formally adopted and effective prior to the commencement of such officer's term. Any such resolution by a board of county commissioners or board of township trustees must be adopted at a regular or special meeting by a majority of a quorum.

5. An ordinance or resolution authorizing the commencement of payments to secure medical or life insurance benefits on behalf of an officer of a municipal corporation operating under a statutory plan of government must be adopted in accordance with R.C. 731.17, and must be effective at the commencement of such officer's term.

6. The amount which a public officer subject to Ohio Const. art. II, §20, R.C. 731.07, or R.C. 731.13 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 officeholder commences.

7. 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 approved and followed.)

8. In the event that the cost of medical or life insurance coverage for a public officer subject to Ohio Const. art. II, §20 should decrease during such officer's existing term, Ohio Const. art. II, §20 requires a direct payment to the officer of the difference between his amount of entitlement and the reduced cost.

9. The legislative body of a county, township, or municipality operating under a statutory plan of government may provide for an escalation in the amount of funds to cover in-term increases in the cost of medical or life insurance for officers of the county, township, or municipality if, but only if: (a) the provision is enacted prior to the commencement of the officeholder's term; (b) the increased funding is automatic and not dependent on any in-term exercise of official discretion; and (c) there is no material alteration in the insurance benefit provided during the officeholder's term (i.e., any increase in premiums is attributable to price increases by the insurer and not to an increase in benefits). Absent such a provision, a county, township, or municipality operating under a statutory plan of government may not use public funds to pay for in-term increases in the cost of medical or life insurance premiums paid on behalf of officers of the county, township, or municipality. (1976 Op. Att'y Gen. No. 76-058 clarified.)

10. The cost of liability insurance primarily geared to the protection of a public officer from liability for official acts does not constitute compensation to the officer for purposes of Ohio Const. art. II, §20.

11. Contributions to the workers' compensation fund, the unemployment compensation fund, and the public employees retirement system made by a public employer on behalf of a public officer pursuant to statutory mandate are not compensation to the public officer for the purposes of Ohio Const. art. II, §20. Amounts withheld from a public officer's salary for the public employees retirement system do constitute compensation to the officer for the purposes of Ohio Const. art. II, §20.