

July 12, 2018

The Honorable Charles S. Howland  
Morrow County Prosecuting Attorney  
60 East High Street  
Mt. Gilead, Ohio 43338

SYLLABUS:

2018-017

A board of county commissioners may procure insurance, coverage, or benefits pursuant to R.C. 305.171(A) for full-time county employees and all county officers, except for members of the county board of elections, so long as the decision by the board of county commissioners to exclude members of the county board of elections is rationally related to a legitimate governmental interest and thus comports with the Equal Protection Clauses of the Ohio and United States Constitutions.



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OPINION NO. 2018-017

The Honorable Charles S. Howland  
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Dear Prosecutor Howland:

We have received your request regarding the procurement of health care insurance for members of a county board of elections. The Morrow County Board of Commissioners procures health care insurance for all county officers and full-time county employees pursuant to R.C. 305.171(A). Effective December 31, 2018, the Morrow County Board of Commissioners will cease its procurement of health care insurance for members of the Morrow County Board of Elections.<sup>1</sup> The Morrow County Board of Commissioners will continue to procure health care

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<sup>1</sup> For the purpose of this opinion, we presume that the Morrow County Board of Commissioners is not implementing this change during the Morrow County Board of Elections members' terms of office. Article II, § 20 of the Ohio Constitution prohibits a change in an officer's compensation "during his existing term." It is well established that the provision of health insurance, as a fringe benefit, is a part of an officer's compensation. *See State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692 (1976) (concluding that the benefits offered to county officers through a health insurance plan procured under R.C. 305.171(A) is a fringe benefit that constitutes "compensation" for the purpose of Ohio Const. art. II, § 20); 2014 Op. Att'y Gen. No. 2014-034, at 2-298 ("[a] board of county commissioners' procurement of group health care insurance policies and the payment of all or part of the cost of a group health care insurance policy under R.C. 305.171(A) is a component of a county employee's compensation"); 2011 Op. Att'y Gen. No. 2011-015, at 2-145 ("[h]ealth care insurance coverage is commonly understood to be a 'fringe benefit,' and when it is provided as a benefit of employment, it is part of the employees' compensation that may be fixed by county appointing authorities"). The Ohio Supreme Court has held that members of a county board of elections are "officers," within the meaning of Ohio Const. art. II, § 20. *See State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (syllabus, paragraph 3) ("[t]he members of a county board of elections ... are ... officers whose compensation is subject to the provision of Section 20 of Article II of the state Constitution, which precludes a change of compensation of any officer during his existing term"). *But see* R.C. 3501.12 ("[f]or the purposes of this section,"

insurance for all other county officers and all full-time county employees.<sup>2</sup> You ask whether R.C. 305.171 authorizes the Morrow County Board of Commissioners to exclude the members of the Morrow County Board of Elections from the provision of health care insurance in this manner.<sup>3</sup>

R.C. 305.171(A) provides that a “board of county commissioners of any county may contract for, purchase, or otherwise procure and pay all or any part of the cost of” certain insurance, coverage, or benefits, “for county officers and employees and their immediate

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which sets forth the compensation of members of boards of elections, “members of boards of elections shall be deemed to be appointed and not elected, and therefore not subject to Section 20 of Article II of the Ohio Constitution”); 1997 Op. Att’y Gen. No. 97-027 (discussing whether members of county boards of elections were entitled to receive the annual compensation prescribed by R.C. 3501.12 in light of Ohio Const. art. II, § 20). Accordingly, a court may find that a board of county commissioners that chooses to offer health insurance to members of a county board of elections at the commencement of those officers’ terms is prohibited by Ohio Const. art. II, § 20 from rescinding that offer of health insurance during the members’ terms. *See* 2005 Op. Att’y Gen. No. 2005-031, at 2-325 to 2-326 (“the county commissioners’ authority to act under R.C. 305.171 is ... limited by the terms of Ohio Const. art. II, § 20”).

<sup>2</sup> The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (“ACA”) generally requires “applicable large employers” to provide their full-time employees “the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan.” 26 U.S.C.A. § 4980H(a)(1); *see also* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762, 189 L. Ed. 2d 675 (2014). Generally, an “‘applicable large employer’ means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.” 26 U.S.C.A. § 4980H(c)(2)(A). You explain that the county defines “full-time employee” to mean an employee that works at least thirty-two hours a week. However, the ACA defines a “full-time employee” to mean, “with respect to any month, an employee who is employed on average at least 30 hours of service per week.” 26 U.S.C.A. § 4980H(c)(4)(A).

<sup>3</sup> R.C. 3501.141(B) provides that “[t]he board of elections of any county, with the approval of the board of county commissioners, may procure and pay all or any part of the cost of” certain types of group health care insurance “for the members appointed to the board of elections under [R.C. 3501.06] and their immediate dependents when each member’s term begins.” You ask whether a board of county commissioners has the authority to offer health care insurance coverage under R.C. 305.171(A) to all county officers, except for members of the county board of elections. Thus, R.C. 3501.141(B), which confers upon a board of county commissioners the discretionary authority to approve the procurement of health insurance for members of a county board of elections by the board of elections itself, is not relevant to your inquiry.

dependents.”<sup>4</sup> Pursuant to this authority, a board of county commissioners may, but is not required to, procure group health care insurance policies for county officers and employees that provide benefits such as medical, hospitalization, and surgical care. R.C. 305.171(A)(1)(a); *see generally Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834 (1971) (“[t]he statutory use of the word ‘may’ is generally construed to make the provision in which it is contained optional, permissive, or discretionary”). A board of county commissioners pays the cost of group health insurance policies “from the funds or budgets from which the county officers or employees are compensated for services.” R.C. 305.171(A). For the purpose of R.C. 305.171, a “[c]ounty officer or employee,” includes, but is not limited to, a member or employee of the county board of elections.” R.C. 305.171(J)(1).

The language of R.C. 305.171 does not require a board of county commissioners to provide insurance, coverage, or benefits to all county officers or employees in a uniform manner. *See* 2014 Op. Att’y Gen. No. 2014-034, at 2-298 to 2-299 (“[n]othing in R.C. 305.171 ... requires a board of county commissioners to provide uniform health insurance coverage for all county personnel or to provide health care insurance to all county personnel on the same terms” (quoting 2004 Op. Att’y Gen. No. 2004-004, at 2-33)); 1981 Op. Att’y Gen. No. 81-082, at 2-323 (“R.C. 305.171, itself, does not require the county to provide a single insurance plan covering all county officers and employees in the same manner”); 1980 Op. Att’y Gen. No. 80-030, at 2-128 (R.C. 305.171 “itself does not disclose any requirement that the benefits accorded thereunder be provided on a uniform basis to all employees”). *Compare* R.C. 305.171(A) with R.C. 505.60(A) (requiring a board of township trustees, in providing group health insurance policies to township officers and employees, to “provide uniform coverage under [the] policies for township officers and full-time township employees and their immediate dependents”). Rather, a board of county commissioners has a certain amount of discretion to provide different types of insurance, coverage, or benefits to different classes of county personnel, or to offer the same types of insurance, coverage, or benefits to those classes on different terms. *See* 2014 Op. Att’y Gen. No. 2014-034, at 2-298 to 2-299. As in this instance, a board of county commissioners may use its discretion under R.C. 305.171(A) to offer health insurance to some, but not all county employees or officers, so long as the board’s reasoning for the classification comports with the equal protection guarantees of Ohio Const. art. I, § 2 and the Fourteenth Amendment to the United States Constitution. *See* 2014 Op. Att’y Gen. No. 2014-034, at 2-300 (“[a]ny differences in health care insurance coverage among categories of personnel or the terms upon which such coverage is available ‘must comport with the equal protection guarantees’” of the Ohio and United States Constitutions (quoting 1981 Op. Att’y Gen. No. 81-082, at 2-323)). *Cf.* 2002 Op. Att’y Gen. No. 2002-026 (syllabus, paragraph 3) (concluding that a board of library trustees of a county library district, in procuring health insurance for its employees under a statute substantially similar to R.C. 305.171(A), “may require that its employees work a minimum number of hours per week in order to be eligible to receive health care benefits

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<sup>4</sup> Members of a county board of elections are county officers, not county employees, as those terms are used in R.C. 305.171(A). *Cf. Pethtel*, 153 Ohio St. 1 (syllabus, paragraph 3).

through the library, provided that the requirement is reasonable and in compliance with constitutional standards”).

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part, that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.” Article I, § 2 of the Ohio Constitution provides, in part, that “[g]overnment is instituted for” the “equal protection and benefit” of the people. “The limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States constitutions are essentially identical.” *Kinney v. Kaiser Aluminum & Chem. Corp.*, 41 Ohio St. 2d 120, 123, 322 N.E.2d 880 (1975). As explained by the Ohio Supreme Court,

“[t]he prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws.”

*Conley v. Shearer*, 64 Ohio St. 3d 284, 288-89, 595 N.E.2d 862 (1992) (quoting *City of Dayton v. Keys*, 21 Ohio Misc. 105, 114, 252 N.E.2d 655 (Montgomery County 1969)).

The Morrow County Board of Commissioners has decided to procure health insurance, as authorized by R.C. 305.171(A), for full-time county employees and all county officers, except for members of the Morrow County Board of Elections. The decision by the Morrow County Board of Commissioners to exclude members of the Morrow County Board of Elections from the health insurance procured for full-time county employees and all other county officers under R.C. 305.171(A) will comport with the Equal Protection Clauses of the Ohio and United States Constitutions only if the exclusion of the board of elections members is “rationally related to a legitimate governmental interest.” *Adkins v. Bd. of Cnty. Comm’rs of Wayne Cnty.*, C.A. No. 2404, 1989 Ohio App. LEXIS 1776, at \*13 (Wayne County May 17, 1989). This standard is known as the “rational basis test.”<sup>5</sup>

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<sup>5</sup> The rational basis test “is discarded for a higher level of scrutiny only where the challenged” classification “involves a suspect class or a fundamental constitutional right.” *State v. Williams*, 88 Ohio St. 3d 513, 530, 728 N.E.2d 342 (2000). “[A] suspect class is one ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process’” (such as those classes defined by “race, alienage, and ancestry”). *Id.* (quoting *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278 (1972))). “Recognized fundamental rights include the right to vote, the right of interstate travel, rights guaranteed by the First Amendment ..., the right to procreate, and other rights of a uniquely

The rational basis test will render distinctions in the application of state laws invalid “only if they bear no relation to the [government’s] goals and no ground can be conceived to justify them.” *Gertsma v. City of Berea*, 135 Ohio App. 3d 655, 660, 735 N.E.2d 459 (Cuyahoga County 1999). Under this test, a classification, “albeit imperfect or discriminatory, will not be set aside if any set of facts reasonably may be conceived to justify it.” *Id.* (quoting *Evans v. Chapman*, 28 Ohio St. 3d 132, 135, 502 N.E.2d 1012 (1986)).

You explain that the decision by the Morrow County Board of Commissioners to procure health insurance for all county officers under R.C. 305.171(A), except for members of the Morrow County Board of Elections, was designed to reduce the costs incurred by the county in procuring insurance under that statute. The objective of containing costs has been recognized by courts as a legitimate governmental interest. *See, e.g., Gertsma*, 135 Ohio App. 3d at 660 (recognizing that a city’s “desire to regulate the cost of garbage collection is a legitimate governmental objective”). Whether, in this instance, the disparate treatment of members of the Morrow County Board of Elections as compared to all other county officers is “rationally related” to the county’s objective of containing the costs of providing health insurance pursuant to R.C. 305.171(A), involves factual inquiries that cannot be resolved by means of a formal opinion of the Attorney General. *See* 2014 Op. Att’y Gen. No. 2014-007, at 2-66 (“[a]n opinion of the Attorney General cannot resolve questions of fact”). We are able to advise, however, that the Morrow County Board of Commissioners has authority under R.C. 305.171(A) to exclude members of the Morrow County Board of Elections from its provision of health insurance to all other county officers, so long as there is a reasonable justification for providing health insurance in this manner.

Accordingly, we conclude that a board of county commissioners may procure insurance, coverage, or benefits pursuant to R.C. 305.171(A) for full-time county employees and all county officers, except for members of the county board of elections, so long as the decision by the board of county commissioners to exclude members of the county board of elections is rationally related to a legitimate governmental interest and thus comports with the Equal Protection Clauses of the Ohio and United States Constitutions.

### **Conclusion**

Based on the foregoing, it is my opinion, and you are hereby advised that a board of county commissioners may procure insurance, coverage, or benefits pursuant to R.C. 305.171(A)

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personal nature.” *Id.* A decision by a board of county commissioners to exclude members of a county board of elections from health insurance coverage provided to all other county officers pursuant to R.C. 305.171(A), does not involve a suspect class or a fundamental right. *Cf.* 1981 Op. Att’y Gen. No. 81-082, at 2-323 (applying a rational basis analysis in determining whether a board of county commissioners may offer insurance benefits to county welfare department employees that are superior to those offered to other county employees). Thus, the application of a rational basis test is appropriate in this instance.

for full-time county employees and all county officers, except for members of the county board of elections, so long as the decision by the board of county commissioners to exclude members of the county board of elections is rationally related to a legitimate governmental interest and thus comports with the Equal Protection Clauses of the Ohio and United States Constitutions.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General