

OPINION NO. 90-092

Syllabus:

1. The board of county commissioners of Licking County may provide health insurance benefits for the judges of the Licking County Court of Common Pleas pursuant to R.C. 305.171.

2. The board of county commissioners of Licking County may not provide health insurance benefits for the judges or for the clerk of the Licking County Municipal Court.

To: Robert L. Becker, Licking County Prosecuting Attorney, Newark, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 28, 1990

I have before me your request for my opinion on the following question:

May the Licking County Commissioners legally and constitutionally provide health insurance benefits for the Judges of the Licking County Court of Common Pleas and for the Judges and Clerk of the Licking County Municipal Court?

The Ohio Constitution mandates that judges may receive only that compensation provided by law. Specifically, Ohio Const. art. IV, §6(B) states that "[c]ommon pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites...." Thus, whether the Ohio Constitution permits the provision of health insurance benefits for judges depends on whether such benefits constitute compensation provided by law or whether they are fees or perquisites. The court in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692, 694 (1976) concluded that, for purposes of Ohio Const. art. II, §20,¹ payments for health insurance premiums are "fringe benefits" which "are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check." In 1987 Op. Att'y Gen. No. 87-021, I determined that the *Parsons* court had apparently included "perquisites" as a component of compensation and that "if a particular fringe benefit is provided for by statute, it must be included as compensation provided by law to which judges are entitled under art. IV, §6(B)." Op. No. 87-021 at 2-139 n.2. Therefore, if a statute authorizes health insurance benefits for judges, such benefits are compensation provided by law, the procurement of which does not violate Ohio Const. art. IV, §6(B).² I note, however, that Ohio Const. art. II, §20 prohibits the in-term commencement of health insurance benefits. *State ex rel. Parsons v. Ferguson*; 1989 Op. Att'y Gen. No. 89-003. Thus, even if authorized by statute, such benefits may not commence during the judge's term of office.³

¹ Ohio Const. art. II, §20 provides 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."

² R.C. 141.05, which provides for compensation in addition to the salary allowed common pleas judges by R.C. 141.04, contains the following language: "[a]s used in this section, 'compensation' does not include any portion of the cost, premium, or charge for health, medical, hospital, dental, or surgical benefits, or any combination thereof, covering a judge of the court of common pleas...and paid on his behalf by a governmental entity." R.C. 1901.11, which sets the compensation for municipal judges, contains language nearly identical to that quoted above. R.C. 1901.11(F). The general assembly clearly expressed its intention, however, that the definition of "compensation" which appears in R.C. 141.05 and R.C. 1901.11 is limited to these sections of the Revised Code. Therefore, I am not precluded from finding that health insurance benefits are a component of compensation for purposes of R.C. 305.171.

³ In 1989 Op. Att'y Gen. No. 89-003, I determined that "[w]here the cost of the group health insurance policy increases during the county officer's term of office, the board of county commissioners may pay the increase for the continuation of the identical benefit provided that the total percentage of the premium cost paid by the board remains the same" without violating Ohio Const. art. II, §20. Op. No. 89-003 at 2-15.

I am not aware of any statute which authorizes specifically the payment of health insurance benefits for judges by the board of county commissioners. However, R.C. 305.171 grants the board of county commissioners the authority to procure such benefits for county officers and employees as follows:

The *board of county commissioners* of any county may contract, purchase, or otherwise *procure* and pay all or 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 said officers or employees are compensated for services, issued by an insurance company, a medical care corporation organized under Chapter 1737. of the Revised Code, or a dental care corporation organized under Chapter 1740. of the Revised Code.

R.C. 305.171(A) (emphasis added). Thus, the question becomes whether the judges of the Licking County Court of Common Pleas and the judges and clerk of the Licking County Municipal Court are, for purposes of R.C. 305.171(A), county officers or county employees.⁴

In Op. No. 87-021, I determined that, for purposes of R.C. 305.171, a common pleas judge is a county officer. *See also* 1985 Op. Att'y Gen. No. 85-014 (a common pleas judge is a county officer for purposes of representation by the county prosecuting attorney under R.C. 309.09(A)). *But see* 1971 Op. Att'y Gen. No. 71-075 (a judge of the court of common pleas is an elected state official for purposes of R.C. 145.381, relating to membership in the public employees retirement system.) Accordingly, I conclude that the Licking County Board of County Commissioners may procure health insurance benefits pursuant to R.C. 305.171 for the judges of the Licking County Court of Common Pleas, provided such benefits do not constitute an in-term increase in compensation in violation of Ohio Const. art. II, §20.

Municipal court judges, however, are not county officers. In *State ex rel. Higley v. Shale*, 137 Ohio St. 311, 29 N.E.2d 214 (1940), the Ohio Supreme Court held that the requirement of art. XVII, §1 of the Ohio Constitution that elections for state and county officers be held in the even-numbered years does not apply to municipal judges "since a municipal judge is neither a state nor county officer...." *Id.* at 313, 29 N.E.2d at 215. Therefore, R.C. 305.171 does not authorize the board of county commissioners to provide health insurance benefits for the judges of the Licking County Municipal Court. Moreover, I am aware of no statute which specifically authorizes the board of county commissioners to procure such health insurance. Since a board of county commissioners has only those powers expressly granted by statute or necessarily implied therefrom, *State ex rel. Shriver v. Board of Comm's.*, 148 Ohio St. 277, 74 N.E.2d 248 (1947), I conclude that the board of county commissioners may not provide health insurance benefits for the judges of the Licking County Municipal Court.

I am not aware of any statute or any case law that specifically addresses the question of whether a municipal court clerk is a county officer. However, I find that the office of municipal court clerk is analogous to the office of municipal court judge for the purpose of determining whether a municipal court clerk is a county

⁴ R.C. 305.171 permits the board of county commissioners to provide health insurance benefits to both county officers and employees. Thus, for purposes of this opinion, I am not required to distinguish between officers and employees.

officer. Although the office of clerk of the court is an office which is separate and distinct from that of the judge, *Hacker v. Payne*, 7 Ohio App. 25, 27 Ohio C.C. (n.s.) 449 (Lucas County 1916), the nature of the office of the clerk is to carry out the court's instructions, *Wanamaker v. Miller*, 164 Ohio St. 174, 128 N.E.2d 108 (1955), *mand. denied sub nom. Wanamaker v. Supreme Ct. of Ohio*, 350 U.S. 881 (1955).

The duties of the clerk of the municipal court are set out by R.C. 1901.31. Generally, the clerk is responsible for administering oaths, taking affidavits, and issuing executions upon judgments rendered in the municipal court. R.C. 1901.31(E). The clerk, *inter alia*, must keep all journals, records, books and papers of the court, record the proceedings of the court, and "perform all other duties that the judges of the court may prescribe...." *Id.* Additionally, the clerk "shall receive, collect, and issue receipts for all costs, fees, fines, bail and other moneys payable to the office or to any officer of the court." R.C. 1901.31(F). Thus, the function of the municipal court clerk is to assist the court by performing administrative tasks.

In a similar analysis, the Supreme Court of Ohio described the position of the clerk of the Supreme Court as follows:

He is only an arm of the court for issuing its process, entering its judgments and performing like duties which the court itself might perform. His services are employed only for the more convenient performance of those functions of the court which are clerical in nature.... [T]he duties of the clerk of the court are the duties of the court itself....

State ex rel. McKean v. Graves, 91 Ohio St. 23, 24, 109 N.E. 528, 528 (1914). This description of the clerk of the Supreme Court appears, in light of the duties enumerated in R.C. 1901.31, to be applicable to that of the municipal court clerk. The functions of the clerk are, in general, determined by the activity of the court, and, in particular, by the judge or judges of the court. Thus, since a municipal court judge is not a county officer, it follows by analogy that a municipal court clerk is likewise not a county officer. Therefore, R.C. 305.171 does not authorize the board of county commissioners to provide health insurance benefits for the municipal court clerk. Additionally, I am aware of no statute which specifically authorizes the board of county commissioners to provide such benefits to the municipal court clerk. I conclude, therefore, that the board of county commissioners may not provide health insurance benefits for the clerk of the Licking County Municipal Court.

Accordingly, it is my opinion, and you are hereby advised:

1. The board of county commissioners of Licking County may provide health insurance benefits for the judges of the Licking County Court of Common Pleas pursuant to R.C. 305.171.
2. The board of county commissioners of Licking County may not provide health insurance benefits for the judges or for the clerk of the Licking County Municipal Court.