

OPINION NO. 2005-046**Syllabus:**

1. If, at the commencement of a county officer's term, the board of county commissioners made health insurance available to that officer under either of two policies at a fixed dollar amount per month to the officer, with the county paying the balance of such cost, and if the county commissioners make a direct legislative change to the health insurance options available to county personnel under R.C. 305.171 during the officer's term, which results in the county's offering health insurance policies with less coverage, higher deductibles, and higher premiums than were available to the officer at the commencement of the officer's term, the county's continuing to provide coverage to the officer under one of the previously offered policies, at the same cost to the officer, does not violate the prohibition in Ohio Const. art. II, § 20 against in-term changes in the officer's compensation, even if the number of county dollars expended for such insurance coverage increases during the officer's term.
2. If, at the commencement of a county officer's term, the board of county commissioners made available to the officer a choice between two health insurance policies at the same cost to the officer, a county officer's mid-term change to coverage under the other policy would not be a prohibited in-term change in compensation, because coverage under either health insurance policy was an option available to the officer at the commencement of the officer's term.
3. If, at the commencement of a county officer's term, the board of county commissioners defined its officers' health care benefits as being those benefits the board may choose from time to time for county personnel under R.C. 305.171, a mid-term change by the board in the county's health care benefits under that statute is direct legislative action by the board and may not be applied to a county officer

during the term the officer is serving when the county commissioners make such change.

To: John H. Hanna, Henry County Prosecuting Attorney, Napoleon, Ohio
By: Jim Petro, Attorney General, December 20, 2005

You have requested an opinion concerning certain changes in a county's health insurance plan and their effects upon those county officers who are mid-term at the time the insurance changes are made. As explained in your opinion request, at the time most of your county's officers began their terms of office, the board of county commissioners offered county personnel health care coverage under one of two insurance policies, for which the county paid all of the premium, except for a fixed sum of \$25, \$50, or \$75, depending on whether the coverage was for single, two-party, or family coverage. Recently, however, due to cost constraints, the board of county commissioners has changed the health insurance policies available to county personnel. As described in your letter, the new health insurance policies "are significantly different and more costly to the employees, containing higher deductibles, less coverage and higher premiums." Based upon these facts, you specifically ask:

1. Are the commissioners required to offer to officials the same policies, at the same rates of expense to the official if said coverage can still be obtained, even though the rest of the employees have totally different policies? (It is my understanding these policies are still available through Medical Mutual.)
2. May an elected official who selected one policy at the start of his term switch to the other policy that was offered at the start of his term, since the cost was the same regardless of which policy was chosen at the start of the term?
3. If the answer to question 1 is "No," then may the officials choose either of the policies now being offered and would the commissioners be required to pay the premium amount in excess of that currently being paid? [I.e. for a family plan on Super Med Plus, would the official pay \$70.00 per month (the amount paid at the outset of his term) and the county pay the balance per month {?]
4. If the answer to question 1 is "Yes," may the official opt to change to either of the two new options and if so, would his cost remain the same as at the start of the term or would he pay the cost now being paid by others for the new options, even though that would be higher and therefor[e] decrease his compensation received at the start of his term?
5. May the commissioners, in an effort to avoid these problems in the future, adopt a resolution that simply states elected officials will be offered the insurance packages available to other employees of the county at the same cost per year as other employees?

Recently, 2005 Op. Att'y Gen. No. 2005-031 addressed the operation of Ohio Const. art. II, § 20 and its application to the health care benefits of county officers. As explained in that opinion, the prohibition in Ohio Const. art. II, § 20 against in-term changes in the compensation of a public officer applies to changes in the health care benefits provided for county officers by the board of county commissioners under R.C. 305.171.¹

2005 Op. Att'y Gen. No. 2005-031 then discusses the various approaches the courts have taken in examining whether changes in an officer's salary or compensation, or a component thereof, is prohibited by Ohio Const. art. II, § 20. In *State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975), the court described the test for determining whether an in-term change in compensation prohibited by Ohio Const. art. II, § 20 had occurred as whether the number of public dollars paid on behalf of the officer had changed. Following the *Artmayer* case, the court in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976), held that a county's payments for its officers' health insurance premiums are part of the officers' compensation for purposes of Ohio Const. art. II, § 20, and so a county that had not previously provided its officers health care benefits could not begin to pay for such benefits on behalf of such officers mid-term. Finally, in *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983), the court refined the analysis for those situations in which an officer's compensation had been established at the commencement of his term pursuant to a formula. As concluded by the *Schultz* court:

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.

6 Ohio St. 3d at 135 (emphasis added).²

¹ See generally R.C. 305.171 (setting forth, in part, the options available to a board of county commissioners in providing health care benefits for county officers and employees).

² Your questions concern mid-term changes to a county officer's health care benefits that result from the action of the county commissioners in establishing the county's health care options under R.C. 305.171. As explained in 2005 Op. Att'y Gen. No. 2005-031, the action taken by a board of county commissioners in designing the county's health care options under R.C. 305.171 is the exercise of legislative action that has been delegated to the county commissioners by the General As-

Accordingly, the test for determining whether a prohibited in-term change in compensation has occurred is whether there has been a change in the number of public dollars expended on behalf of a public officer during the officer's term,³ with the exception that, in those situations in which a public officer's compensation or a component thereof was fixed at the commencement of the officer's term pursuant to a formula, a change in compensation that occurs as a result of a non-legislative change in one of the external factors used in that formula is not prohibited by Ohio Const. art. II, § 20.⁴

sembly and to which the terms of Ohio Const. art. II, § 20 apply. See 2000 Op. Att'y Gen. No. 2000-043 at 2-261 ("Ohio Const. art. II, § 20 applies to compensation increases approved by subordinate bodies to whom the General Assembly has delegated the authority to fix compensation").

³ As determined by the court in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976), the payment of health insurance premiums from public funds for the benefit of a county officer is part of that officer's compensation for purposes of Ohio Const. art. II, § 20. See *Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969) (syllabus, paragraph one) ("[a]s to each county employee receiving the right to the benefits of a group health insurance plan procured by a board of county commissioners pursuant to Revised Code Section 305.171, that part of the premium which is paid from public funds is a part of the cost of the public service performed by each such employee"). Thus, a change in the number of dollars an officer must pay for health care coverage is not, in itself, determinative of whether a prohibited in-term change in the officer's compensation has occurred. Rather, the focus of such an inquiry is upon a change in the number of county dollars spent on the officer's behalf for such benefits, see *State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975), and whether such change results from a direct legislative change to the terms upon which the county made such benefits available to the officer at the commencement of the officer's term, see *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983).

⁴ See, e.g., 2005 Op. Att'y Gen. No. 2005-031 (syllabus, paragraph one) ("[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"); 2000 Op. Att'y Gen. No. 2000-043 (syllabus, paragraph three) ("[i]f a board of township trustees passes a resolution that fixes the annual salary of township trustees as the maximum amount permitted under R.C. 505.24, without setting forth a specific dollar figure, Ohio Const. art. II, § 20 prohibits a trustee from receiving an in-term increase in salary that results from a change by the General Assembly to the compensation scheme or compensation rates of R.C. 505.24 during the trustee's term. Ohio Const. art II, § 20 does not, however, prohibit a township trustee who is compensated pursuant to such a resolu-

2005 Op. Att’y Gen. No. 2005-031 then explains the procedure to determine whether a mid-term change in health care coverage provided to a county officer by the county commissioners under R.C. 305.171 is an impermissible in-term change in the officer’s compensation, as follows:

[B]ecause 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, 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). 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.*

2005 Op. Att’y Gen. No. 2005-031 at 2-326 (footnotes omitted; emphasis added). *See generally id.* at 2-328 to 2-329 (examples of various types of changes in a county officer’s health care benefits).

With this background in mind, we will now consider your first question, which asks whether the county commissioners are required to offer to county officers throughout their terms the same health insurance policies, at the same rates of expense to the officers if that coverage can still be obtained, even though the county is now providing its employees health insurance under totally different policies, which you describe as being “significantly different and more costly to the employees, containing higher deductibles, less coverage and higher premiums.”

In answering this question, we must first note that, in designing the health care options it will make available to county personnel, a board of county commissioners may offer only those health care benefits described in R.C. 305.171 and may offer those benefits only in the manner described in that statute. *See* 1993 Op. Att’y Gen. No. 93-070 at 2-322 (“[a]lthough R.C. 305.171 permits boards of county commissioners certain discretion in determining the specific benefits to be provided to county personnel under that statute, it expressly limits the means by which such

tion from receiving an in-term increase in salary resulting from a statutory scheme, effective prior to the commencement of the trustee’s term, that provides periodic automatic increases in the rates of compensation for township trustees or from an increase in the township budget”).

benefits may be provided’’). *See generally State ex rel. Shriver v. Board of Comm’rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (a board of county commissioners is a creature of statute; as such, it may exercise only those powers granted it by statute or necessarily implied therefrom). R.C. 305.171 does not, however, require that the same benefits be made available to all county personnel on the same terms. *See* 2004 Op. Att’y Gen. No. 2004-004 (syllabus, paragraph three) (‘‘R.C. 305.171 does not require a board of county commissioners to pay the same percentage of premium on behalf of those county employees who receive family coverage as it pays on behalf of those who receive only individual coverage, so long as the county has a rational basis for making such distinction’’). Thus, R.C. 305.171 does not require that all county personnel, officers and employees, receive health care benefits under the same policies of insurance.

In the situation you describe, the number and extent of changes the board of county commissioners has made in the county’s health care options, *i.e.*, changes in deductibles, types of coverage and amounts of the premiums payable by the county and county personnel, suggest that the board has established an entirely different plan, *i.e.*, formula, for the health care options available to county personnel. None of the information you have provided indicates that these changes are the result of changes in variables included in a formula, in place at the commencement of the officers’ terms, that defined the officers’ health care benefits. It appears, therefore, that the situation you describe falls within the following rule set forth in 2005 Op. Att’y Gen. No. 2005-031 (syllabus, paragraph four):

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.

Because the actions of the board of county commissioners in the circumstances you describe appear to constitute the type of direct legislative action described in *Schultz v. Garrett*, such changes may not be applied to a county officer during the term the officer is serving when the board institutes such changes.

You have informed us that, although the board of county commissioners has selected new health insurance policies for county personnel, the insurance policies that were offered by the county to the officers at the commencement of their terms are still being offered by the insurance companies, although at an increased premium rate. Because we have determined that the board’s change in health insurance policies appears to be the result of the direct legislative action of the board in defining the health care options available to county personnel under R.C. 305.171 and may not, therefore, be applied to county officers during their existing terms of office, the county’s continuation of coverage for such officers, until the end of the terms they were serving when the county commissioners made such changes, under

the health insurance policies available to them at the commencement of their terms would avoid an impermissible in-term change in the officers' compensation for purposes of Ohio Const. art. II, § 20, even though the county's payment of all but the previously established number of dollars would increase the number of dollars the county spends for such benefits for its officers.⁵

In answer to your first question, we conclude that, if at the commencement of a county officer's term, the board of county commissioners made health insurance available to that officer under either of two policies at a fixed dollar amount per month to the officer, with the county paying the balance of such cost, and if the county commissioners make a direct legislative change to the health insurance options available to county personnel under R.C. 305.171 during the officer's term, which results in the county's offering health insurance policies with less coverage, higher deductibles, and higher premiums than were available to that officer at the commencement of the officer's term, the county's continuing to provide coverage to the officer under one of the previously offered policies, at the same cost to the officer, does not violate the prohibition in Ohio Const. art. II, § 20 against in-term changes in the officer's compensation, even if the number of county dollars expended for such insurance coverage increases during the officer's term.⁶

⁵ You have not asked, and this opinion is not considering whether there are alternative means of avoiding a prohibited in-term change in the county officers' compensation. *See, e.g.*, 2004 Op. Att'y Gen. No. 2004-004 (syllabus, paragraph six) (stating, in part, "[i]f the cost of a county officer's health insurance premium increases mid-term due to an increase in the coverage provided, payment of the increased premium by a county would be an in-term change in compensation prohibited by Ohio Const. art. II, § 20. In that situation, however, a county officer may take advantage of such a mid-term increase in coverage by paying the additional cost from his personal financial resources for the remainder of the term he was serving when the increased coverage was implemented, thereby avoiding any in-term increase in compensation"); 1993 Op. Att'y Gen. No. 93-045 (syllabus, paragraph two) ("[w]here a county has, during a county officer's term, decreased the percentage of the premium it pays on behalf of county officers for insurance coverage provided under R.C. 305.171, without any change in the amount of coverage thus provided, and where the officer has personally paid the premium difference in order to maintain that insurance coverage, the county must pay to such officer a cash sum representing the difference between the percentage of the premium formerly paid by the county and the percentage currently paid by the county. The county must reimburse a county officer for the difference in insurance premiums covering only the remainder of the term the officer was serving at the time the decrease became effective").

⁶ Having concluded that, in the circumstances you describe, the board of county commissioners' change in health insurance policies for county personnel under R.C. 305.171 to policies offering less coverage, higher deductibles, and higher premiums than were offered under the policies available to a county officer at the commencement of the officer's term is direct legislative action that may not be ap-

Your second question asks about a situation in which a board of county commissioners made available to its officers at the commencement of their terms a choice between two health insurance policies, at the same cost to the officers, regardless of which policy the officers chose. You ask whether Ohio Const. art. II, § 20 prohibits a county officer, who selected one of the policies at the commencement of his term, from switching to coverage under the other policy during his term of office. Because, at the commencement of the officer's term, the county offered a choice between two health insurance policies at the same cost to the officers, a county officer's mid-term change to coverage under the other of the two policies available to him at the commencement of his term involves no "direct legislative adjustment to the formula" defining the officer's health care benefits. Such a change is not, therefore, an in-term change in compensation prohibited by Ohio Const. art. II, § 20. Compare 2005 Op. Att'y Gen. No. 2005-031 (syllabus, paragraph one) ("[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") with 2005 Op. Att'y Gen. No. 2005-031 (syllabus, paragraph four) ("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").

Your last question asks whether a board of county commissioners may adopt a resolution that "simply states elected officials will be offered the insurance packages available to other employees of the County at the same cost per year" as is paid by county employees and thereby allow the county officers to participate in whatever increases or decreases the board makes during the officers' terms to the county's health care options under R.C. 305.171 without violating Ohio Const. art. II, § 20. In this example, the formula includes a variable, *i.e.*, the health care options selected periodically by the board of county commissioners. This variable, however, is defined directly by the legislative action of the board of county commissioners in carrying out its authority to choose the health care options that will be available to county officers, employees, and their dependents under R.C. 305.171. Any mid-term changes in the county's health care options that are the direct result of the county commissioners' actions under R.C. 305.171 may not be applied mid-term to a county officer. Thus, if, at the commencement of a county officer's term, the board

plied to a county officer during the term the officer is serving when the change becomes effective, we find it unnecessary to address your third and fourth questions concerning the terms upon which a county officer would be able to change mid-term to one of the newly offered health insurance policies.

of county commissioners defined its officers' health care benefits generally as those benefits the board may make available to county personnel under R.C. 305.171, and if, during the officer's term, the board, in the exercise of its authority under R.C. 305.171, changes the health care options offered to county personnel, such changes are the result of the direct legislative action of the board. The application of any such changes to the county officer during the officer's term is thus prohibited by Ohio Const. art. II, § 20.

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

1. If, at the commencement of a county officer's term, the board of county commissioners made health insurance available to that officer under either of two policies at a fixed dollar amount per month to the officer, with the county paying the balance of such cost, and if the county commissioners make a direct legislative change to the health insurance options available to county personnel under R.C. 305.171 during the officer's term, which results in the county's offering health insurance policies with less coverage, higher deductibles, and higher premiums than were available to the officer at the commencement of the officer's term, the county's continuing to provide coverage to the officer under one of the previously offered policies, at the same cost to the officer, does not violate the prohibition in Ohio Const. art. II, § 20 against in-term changes in the officer's compensation, even if the number of county dollars expended for such insurance coverage increases during the officer's term.
2. If, at the commencement of a county officer's term, the board of county commissioners made available to the officer a choice between two health insurance policies at the same cost to the officer, a county officer's mid-term change to coverage under the other policy would not be a prohibited in-term change in compensation, because coverage under either health insurance policy was an option available to the officer at the commencement of the officer's term.
3. If, at the commencement of a county officer's term, the board of county commissioners defined its officers' health care benefits as being those benefits the board may choose from time to time for county personnel under R.C. 305.171, a mid-term change by the board in the county's health care benefits under that statute is direct legislative action by the board and may not be applied to a county officer during the term the officer is serving when the county commissioners make such change.