OPINION NO. 2013-040

Syllabus:

2013-040

R.C. 505.60(D), as amended by Sub. H.B. 347, 129th Gen. A. (2012) (eff. Mar. 22, 2013), does not apply retroactively to out-of-pocket premiums a township officer or employee paid prior to March 22, 2013, for health care insurance coverage for the officer or employee's immediate dependents.

To: Justin Lovett, Jackson County Prosecuting Attorney, Jackson, Ohio

By: Michael DeWine, Ohio Attorney General, December 13, 2013

You have requested an opinion whether a 2012 amendment to R.C. 505.60(D) applies retroactively. R.C. 505.60(D) provides:

> If any township officer or employee is denied coverage under a health care plan procured under this section or if any township officer or

> employee elects not to participate in the township's health care plan, the township may reimburse the officer or employee for each out-of-pocket premium attributable to the coverage provided for the officer or employee *and their immediate dependents* for insurance benefits described in division (A) of this section that the officer or employee otherwise obtains, but not to exceed an amount equal to the average premium paid by the township for its officers and employees under any health care plan it procures under this section. (Emphasis added.)

The 2012 amendment added the words "and their immediate dependents" to this provision, extending the out-of-pocket premiums for which township officers or employees may be reimbursed by the township. Sub. H.B. 347, 129th Gen. A. (2012) (eff. Mar. 22, 2013). *See generally* 2012 Op. Att'y Gen. No. 2012-027 (considering the meaning of R.C. 505.60(D) before the 2012 amendment). You ask whether the statute as amended may be applied retroactively to authorize a board of township trustees to reimburse a township officer or employee for out-of-pocket premiums attributable to health care insurance coverage of the officer or employee's immediate dependents that the officer or employee obtained prior to the amendment's effective date of March 22, 2013.

Two provisions of Ohio law address the retroactive application of a statute. 2010 Op. Att'y Gen. No. 2010-002, at 2-10; 2008 Op. Att'y Gen. No. 2008-011, at 2-131. First, Article II, section 28 of the Ohio Constitution provides that the "[G]eneral [A]ssembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts;" instead, the power of the General Assembly to enact retroactive legislation is limited to "legislation that is merely remedial in nature." *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶9; *accord Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶7; *State v. Cook*, 83 Ohio St. 3d 404, 410, 700 N.E.2d 570 (1998); 2008 Op. Att'y Gen. No. 2008-011, at 2-132. The General Assembly has enacted legislation to codify this constitutional provision in R.C. 1.48, which provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." *Accord Hyle* at ¶7; *State v. Consilio* at ¶9.

The test for determining whether a statute may be applied retroactively is well settled. As explained in *State v. Consilio*, at ¶10, the Ohio Supreme Court has distilled the foregoing legal provisions into the following two-part test for evaluating whether a statute may be applied retroactively:

> First, the reviewing court must determine as a threshold matter whether the statute is expressly made retroactive. The General Assembly's failure to clearly enunciate retroactivity ends the analysis, and the relevant statute may be applied only prospectively. If a statute is clearly retroactive, though, the reviewing court must then determine whether it is substantive or remedial in nature. (Citations omitted.)

Thus, for purposes of the retroactivity analysis, "[t]he first part of the test determines whether the General Assembly 'expressly made [the statute] retroactive,' as required by R.C. 1.48; the second part determines whether it was

empowered to do so." *Hyle* at ¶8 (citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 106, 522 N.E.2d 489 (1988)); 2008 Op. Att'y Gen. No. 2008-011, at 2-132.

To apply this analysis, we first must determine whether R.C. 505.60(D), as amended by Sub. H.B. 347, was expressly made retroactive by the General Assembly. Our review of R.C. 505.60(D) discloses no indication of retroactive application. No language in the statute, elsewhere in the Revised Code, or in Sub. H.B. 347, which amended R.C. 505.60(D), explicitly declares or suggests that R.C. 505.60(D) is to be applied retroactively.

Because R.C. 505.60(D) is silent on the question of its retroactive application, the presumption in favor of prospective application controls. R.C. 1.48; *Hyle* at ¶10; *State v. Consilio* at ¶15. *See generally Kelley v. State*, 94 Ohio St. 331, 338-39, 114 N.E. 255 (1916) (when "the intention of the Legislature is to give to such repealing or amending act a retroactive effect, such intention must not be left to inference or construction, but must be manifested by express provision in the repealing or amending act"). Had the General Assembly intended for R.C. 505.60(D) to operate retroactively, it could have employed language similar to that used in other statutes. *See, e.g.*, 1985-1986 Ohio Laws, Part I, 736-37 (Am. Sub. S.B. 307, eff. Aug. 22, 1986) (expressly proclaiming the applicability of former R.C. 4121.80(H) in spite of contrary preexisting law by including the phrase "notwithstanding any provisions of any prior statute or rule of law of this state"). *See generally Lake Shore Elec. Ry. Co. v. Pub. Utils. Comm'n of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other matters); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 69, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result). *See generally NACCO Indus., Inc. v. Tracy*, 79 Ohio St. 3d 314, 316, 681 N.E.2d 900 (1997), *cert. denied*, 522 U.S. 1091 (1998) ("Congress is generally presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another").

R.C. 505.60(D) lacks any indication that it should be applied retroactively. Thus, it may be applied only prospectively to out-of-pocket premiums a township officer or employee paid or pays on or after March 22, 2013, for health care insurance coverage for the township officer or employee's immediate dependents.

In conclusion, it is my opinion, and you are hereby advised that R.C. 505.60(D), as amended by Sub. H.B. 347, 129th Gen. A. (2012) (eff. Mar. 22, 2013), does not apply retroactively to out-of-pocket premiums a township officer or employee paid prior to March 22, 2013, for health care insurance coverage for the officer or employee's immediate dependents.