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OPINION CONTAINED

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FILE # ML-41821-00

I.D. # 41821

December 28, 2000

Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Via Certified Mail Return Receipt Requested

RE: Request for an opinion and brief in support of that request concerning: (1) whether Smith County is in violation of Article III, Section 53 of the Texas Constitution if it pays group health insurance premiums for certain retirees; (2) if the county is violating this provision of the constitution, must the county seek reimbursement for the premiums it has paid on behalf of these certain retirees; and (3) if the county is violating this provision of the constitution, must the county remove these retirees from its group insurance coverage?

Dear General Cornyn:

This office is submitting a request for an opinion concerning the above issues and is submitting a brief pursuant to section 402.043 of the Texas Government Code. In accordance with Section 41.007 of the Government Code, the Smith County Auditor submitted this request for an opinion to my office. The county auditor is in agreement with the conclusions reached herein, thus I am submitting this request for an opinion from your office on behalf of the county auditor.

Factual Background

On September 9, 1996, the Smith County Commissioners Court approved a policy to provide group health insurance coverage for future retirees and to pay 100% of the premiums for these retirees. The effective date of this policy was October 1, 1996. Prior to October 1, 1996, Smith County retirees were offered continued COBRA coverage at their own expense. As of October 1, 1996, there were nine (9) county retirees on COBRA paying their own premiums. The Commissioners Court opted to include these 9 retirees in the new policy. Thus, the county included these 9 retired individuals in its group health policy and began paying the insurance premiums for these 9 retirees beginning October 1, 1996. The county has continued paying 100%

of these premiums to present.

Issue 1

Does the inclusion of these 9 retirees constitute unbargained-for, retroactive compensation in violation of Texas Constitution, Article III, Section 53?

Article III, section 53 of the Texas Constitution prohibits any county from granting any “extra compensation, fee, or allowance to a public officer, agent, servant, or contractor, after service has been rendered or a contract has been entered into, and performed in whole or in part.” TEX. CONST. art. III, section 53. This section of the constitution was discussed in Attorney General Opinion No. JC-0297, dated October 24, 2000. *See Op. Tex. Att’y Gen. No. JC-0297 (2000)*. In Opinion JC-0297, your office stated that, unless the county agreed to pay a portion of the retirees’ health premiums as part of their compensation for services rendered to the county, article III, section 53 precluded the county from now paying a portion of their premiums. *Id.*

At issue in Opinion JC-0297 was whether Kleberg County could pay half of the COBRA premiums for its retirees for an indefinite period of time. *Id.* The retirees at issue continued their health insurance through COBRA at their own expense. *Id.* The premiums went up considerably and the county wanted to know whether it could pay half of the premiums for the retirees. *Id.* Your office determined that COBRA did not authorize or require a county to pay any portion of an employee’s health care premiums. *Id.* Your office also stated that a county may not agree to pay a portion of a retiree’s health premiums unless doing so is authorized by state law *and* is consistent with article III, section 53. *Id.*

In *City of Greenville v. Emerson*, 740 S.W.2d 10,13 (Tex. App. - Dallas 1987, no writ), the appellate court held that the city’s new method of calculating retirement benefits to retirees and agreement to pay them the amount they would have received if this new method had been applied violated article III, section 53. The court stated that this would, in effect, constitute entering into a second contract with the retirees to pay them additional benefits (above what they received under their existing contract) for no additional consideration. *Id.* However, the court pointed out that payment of increased benefits would not run afoul of article III, section 53 if, at the time of retirement, the law governing the retirement plan expressly provided for the possibility of additional payments. *Id.*

For example, in Letter Opinion No. 97-113, the Attorney General determined that a post-retirement increase in benefits did not violate article III, section 53 because the Fire Fighters Retirement Act, V.T.C.S. article 6243, section 7 expressly provided for the possibility of increased benefits. Op. Tex. Att’y Gen. No. LO97-113 (1997). Because the Fire Fighters Retirement Act expressly provided for this possibility, the increase in benefits was determined to be part of the employees’ agreed compensation and was not retroactive or unbargained-for compensation in violation of the Texas Constitution. *Id.*

In the case at hand, Smith County’s provision of group health insurance to its retirees and paying their premiums for same is consistent with Texas law. Texas Insurance Code, article 3.51-

2 (b) specifically allows a county to pay all or a portion of the premiums for a group health insurance plan for its employees and retirees. *See* Tex. Ins. Code Ann. art. 3.51-2 (Vernon Supp. 2000). However, in Opinion JC-0297, your office stated that a county may not pay for all or a part of a retiree's health premiums unless doing so is authorized by state law *and* is consistent with article III, section 53. *See* Op. Tex. Att'y Gen. No. JC-0297 (2000).

Although Smith County's paying of group health insurance premiums for these 9 retirees is authorized by state law, it is not clear that it is consistent with article III, section 53. At the time these 9 individuals retired, the law or policies governing their retirement plan did not provide for the possibility of the county including them in their group plan or paying any portion of their health insurance premiums. Rather, at the time these 9 persons retired, the policy of the county was that retirees would pay 100% of their premiums for continued COBRA coverage. Thus, the inclusion of these 9 retirees in the group plan and the county's paying of their premiums could be considered retroactive compensation in violation of article III, section 53 of the Texas Constitution.

Issue 2

If the inclusion of these 9 retirees does in fact violate Texas Constitution, Article III, Section 53, then does the county have to seek reimbursement of the premiums it has previously paid from these 9 retirees?

Having found no authority for seeking reimbursement from these retirees, it would appear that the county has no duty or ability to collect past premiums from the 9 retirees.

Issue 3

If the inclusion of these 9 retirees does in fact violate Texas Constitution, Article III, Section 53, then can the county continue to include these 9 retirees under its group insurance policy if the retirees pay all of the premiums?

Under the same authority cited above under "Issue 1", the mere inclusion of these 9 retirees in the group plan (even if they pay 100% of their premiums) may be retroactive compensation in violation of article III, section 53. At the time they retired, these 9 individuals were only entitled to have continued coverage under COBRA. The inclusion of these 9 retirees in the group plan could be construed to constitute unbargained-for, retroactive compensation in violation of the Texas Constitution.

Thank you for your consideration of this matter.


Jack M. Skeen, Jr.
Smith County Criminal District Attorney

cc: Ann Wilson, Smith County Auditor