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Office of the Attorney General

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The Honorable Lea Anne Hawkins
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Dear Prosecutor Hawkins,

Your office has asked for an Opinion of the Attorney General regarding the legality of several aspects of Lewis County's contributions toward county-retiree health insurance premiums. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it relies solely on the factual assertions set forth in your office's letter to the Attorney General's Office.

According to your office's letter, the County Commission of Lewis County (the "Commission") voted in 2008 to contract with a private health insurance provider for a group policy covering regular employees. For county retirees who elected to receive coverage under that private policy, the Commission voted to pay for 75% of the retiree's health coverage premiums and 50% of premiums for the retiree's spouse. The premiums for the retiree's spouse would survive the retiree's death. Your office's letter states that at least one of the three Lewis County commissioners (the "Commissioners") was to retire within two months after the vote.

In 2011, the Commission voted to change its health insurance provider to the West Virginia Public Employees Insurance Agency ("PEIA"). All regular and retired Lewis County employees were transferred to that plan. With regard to retirees, the Commission decided to

continue to pay the same portion of the premiums it had under the private plan: 75% of retiree premiums, 50% of spouse premiums, and 50% of survivor premiums. The letter from your office suggests these payments exceed the County's required contribution as an employer.

Your office's letter raises a number of legal questions, each addressed in turn below:

> *(1) May a county commission increase the premium payments for its retirees beyond the payment required by PEIA? (2) Has an elected official used a public office for personal gain by voting for an increase in retiree benefits under PEIA, if he or she would eventually benefit from that increase? (3) May a future county commission reduce the amount of retiree health benefits provided under PEIA? (4) Must a county offer regular employees and retired employees the same level of health benefits?*

Question One: May a county commission increase the premium payments for its retirees beyond the payment required by PEIA?

Under the Public Employees Insurance Act, W. Va. Code § 5-16-1, *et seq.* (the "Act"), a county that uses PEIA as its insurance provider must pay a portion of its retirees' insurance premiums. The Act permits retired employees and their spouses and dependents to enroll in PEIA. *See* W. Va. Code § 5-16-13(i). In turn, Section 5-16-18(c) expressly requires that employers "not operating from the General Revenue Fund"—which includes counties, cities and towns—pay a "*share of premium costs* from their respective budgets." *Id.* § 5-16-18(c) (emphasis added). PEIA's finance board is charged with "establish[ing] the employers' share of premium costs to reflect and pay the actual costs of the coverage including incurred but not reported claims." *Id.*[1]

As we read the statute, these required payments are merely *minimums*, and participating employers may make additional voluntary contributions on behalf of a retired employee. Section 5-16-18(d) expressly provides that an employer who participates in PEIA may, in its discretion, pay part of its employees' costs: "The contribution of the other employers (namely: A county, city or town) in the state . . . shall be the percentage of the cost of the employees' insurance package *as the employers determine reasonable and proper under their particular circumstances*." (emphasis added). Although this section does not specifically reference retired employees, we find nothing in the statute that would otherwise suggest the Legislature intended to prohibit a county employer from similarly choosing to pay part of its retired employees' PEIA

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[1] *See also id.* § 5-16-5(a) (charging the finance board with "apportioning necessary costs equitably among participating employers, employees and retired employees and providers of health care services); *id.* § 5-16-5(c) (providing that the finance board's financial plans shall establish "[t]he levels of premium costs to participating employers"). *Cf.* Syl. pt. 2, *State ex rel. Lambert v. Cnty. Comm'n of Boone Cnty.*, 192 W. Va. 448, 452 S.E.2d 906 (1994) (holding that employers who elect to participate in the Public Employees Retirement System, but have not participated in PEIA, must nevertheless contribute to PEIA when its retired employee elects to participate in PEIA).

premiums. To the contrary, other parts of the statute evidence the Legislature's specific desire to allow financial accommodations for retired employees.[2]

This reading of the PEIA statute is further bolstered by language in the separate statute concerning the authority that county commissions have to enroll in *private* health insurance plans. West Virginia Code § 7-5-20 authorizes county commissions to "negotiate for, secure and adopt for the officers and regular employees thereof" a group health insurance policy from a private insurer. With respect to active employees, a county commission is "authorized and empowered to pay the entire premium cost, or any portion thereof of said group policy or policies." *Id.* But counties are more restricted when it comes to retirees' private health plan premiums. In sharp contrast to the Public Employees Insurance Act, this statute concerning private insurance expressly requires any retired employee who wishes to remain on the insurance to "pay[] the *entire* premium for coverage involved." *Id.* (emphasis added). That language suggests that the Legislature could similarly have limited employer contributions to retired employees on PEIA insurance, if it wanted to do so. It did not.

Question Two: Has an elected official used a public office for personal gain by voting for an increase in retiree benefits under PEIA, if he or she would eventually benefit from that increase?

As your office's letter recognizes, state law prohibits a public official from using his or her office for private gain. Specifically, West Virginia Code § 6B-2-5(b)(1) states: "A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her private gain or that of another person." W. Va. Code § 6B-2-5(b)(1).

Notwithstanding this law, we conclude that there are circumstances under which an elected official could permissibly vote for an increase in retiree benefits under PEIA, even if he or she would eventually benefit from that increase. In a separate but related context, the West Virginia Ethics Commission has considered whether the restriction on using public office for private gain prevents county commissioners from establishing and enjoying the benefit of county wellness programs for county employees. A.O. No. 2009-02, W. Va. Ethics Comm'n (Mar. 5, 2009) (the "2009 Ethics Opinion"). In a 2009 advisory opinion, the Ethics Commission opined that commissioners could not vote for, and then participate in, wellness programs. Concluding that only the Legislature can increase the compensation of county elected officials, the Ethics Commission explained, "[s]ince the Legislature has not authorized Counties to spend public monies on wellness programs from County elected officials, we find that it would violate W. Va. Code § 6B-2-5(b)(1) for the County to extend the benefits of its wellness program to its elected officials." *Id.* But the Ethics Commission recognized that the answer would be different if the

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[2] *See, e.g.*, W. Va. Code § 5-16-5(c) (specially permitting the finance board to "establish different levels of costs to retired employees based upon length of employment with a participating employer, ability to pay or other relevant factors); *id.* (authorizing the finance board to "allocate a portion of the premium costs charged to participating employers to subsidize the cost of coverage for participating retired employees, on such terms as the finance board determines are equitable and financially responsible); *id.* § 5-16-22 (requiring employers that do not participate in PEIA as a group nevertheless to contribute toward the cost of coverage for its retired employees who choose to participate in PEIA individually).

Legislature authorized the additional benefits. In particular, the Ethics Commission noted that the Legislature had "specifically increased the compensation of County officials by providing for health insurance benefits to be paid by the County." *Id.*

This same rationale could permit a county commissioner to vote for an increase in the amount that the County pays toward retiree health premiums under PEIA. Under the Public Employees Insurance Act, the Legislature has specifically authorized counties to contribute to the retiree insurance premiums of at least some county officials. Section 5-16-2(3) of the Act defines "Employee" broadly, and includes within its definition "an elected officer, who works regularly full time in the service of . . . a county[.]" The Act does not define the term "full time," and your letter does not explain whether the Commissioners work regularly full-time in the service of Lewis County. If the Commissioners are "employees" within the meaning of the Act, however, then the Legislature has authorized them to be treated the same as other County retirees and benefit from any increased compensation allowed under the Act. As such, a vote by a Commissioner to increase the amount that the County pays toward retiree health premiums under PEIA would not constitute an impermissible use of public office for personal gain.

Furthermore, the reasoning of the Ethics Commission in its 2009 advisory opinion turned on its belief that wellness programs constitute additional "compensation" for county officials. That concern is not present here. The Supreme Court of Appeals has recognized that "membership in a retirement system does not constitute extra compensation." *Campbell v. Kelly*, 157 W. Va. 453, 473, 202 S.E.2d 369, 381 (1974).

Question Three: May a future county commission reduce the amount of retiree health benefits provided under PEIA?

Although a county commission may elect to contribute more to PEIA than the County's required payment as an employer, we conclude based on two decisions of the Supreme Court of Appeals of West Virginia that no law prohibits a commission from returning that payment to the minimum required payment. In the first decision, the Supreme Court of Appeals considered whether retired state judges were entitled to judicial pay raises that had been given to active judges. *Wagoner v. Gainer*, 167 W. Va. 139, 279 S.E.2d 636 (1981). The Court recognized that contributory plans—that is, retirement plans by which the employee makes monetary contributions during his or her employment—are contractual obligations. If the employee satisfies the requirements of the plan and becomes vested, the Legislature's ability to modify those benefits is significantly limited. But the Court also acknowledged that non-contributory plans—that is, plans in which the employee does not contribute—are simply gratuitous and may be altered. *Id.* at 146, 641. Seven years later in a second decision, the Court affirmed that statutory retirement rights constitute a portion of a state employee's compensation and are thus a contractual right. *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988). This holding relied on two particular factors: employees contribute toward their retirement benefits during their active employment, and those retirement benefits are secured by statute.

While these cases do not address the particular circumstance in question, they offer a useful framework. Retiree benefits are contractually guaranteed if they are established at the time of employment, are part of a contributory plan, and are secured by statute. Conversely,

benefits are gratuitous if they are created after the time of employment, are not part of a contributory plan, and are not guaranteed by statute.

Under this framework, county-provided premium payments to PEIA that exceed an employer's required payment are not a contractually vested property right. The extra premium payments are relatively new, non-contributory, and not guaranteed by statute. *See* W. Va. Code § 5-16-18(d) ("The contribution of the other employers (namely: A county, city or town) in the state . . . shall be the percentage of the cost of the employees' insurance package *as the employers determine reasonable and proper under their particular circumstances*." (emphasis added)). As such, the increased payments are gratuitous and can be reduced at any time. Indeed, even the retired employee's premium contributions are not guaranteed and are subject to revision. *See* W. Va. Code 5-16-13(i) ("The retired employee's premium contribution for the coverage shall be established by the finance board.").

Additionally, with regard to elected county officials, we do not believe that reducing the extra county-paid benefits would violate the constitutional prohibition against reducing the salaries of public officers during their term in office. W. Va. Const. art. 6 § 38 ("Nor shall the salary of any public officer be increased or diminished during his term of office[.]"). As noted above, the Supreme Court of Appeals has recognized that "membership in a retirement system does not constitute extra compensation within the meaning of Section 38." *Campbell*, 157 W. Va. at 473, 202 S.E.2d at 381. The issue in *Campbell* was whether state legislators could constitutionally benefit from increases in retirement benefits that they had approved. The relator had argued that such an increase violated Article 6, Section 38 because it constituted an increase in salary. But the Court rejected this argument, explaining that "pensions are not traditional 'salary,' . . . but rather are things Sui generis which were not contemplated within the constitutional structure established in 1872." *Id.* at 464, 202 S.E. 2d at 376 (discussing *State ex rel. Patteson v. Sims*, 136 W. Va. 106, 65 S.E.2d 730 (1951)). Under this reasoning, retiree health benefits are similarly not part of a county commissioner's "salary." A reduction in those benefits would thus not contravene Article 6, Section 38.

Question Four: Must a county offer regular employees and retired employees the same level of health benefits?

No authority requires that a county commission give regular employees and retired employees the same health insurance benefits. The Supreme Court of Appeals has recognized that regular employees and retired employees are subject to inherently different treatment, and that different treatment does not violate equal-protection principles. *State ex rel. Lambert*, 192 W. Va. at 456, 452 S.E.2d at 914. *Lambert*, for example, considered whether PEIA was unconstitutional because it treats retired employees differently from regular employees. Without considerable discussion, the *Lambert* Court explained simply that treating current and retired employees differently was "reasonably related to . . . a legitimate governmental purpose." *Id.* As a result, any different treatment did not violate due process and equal protection principles. Similarly, the County does not violate equal protection or due process by providing different levels of health benefits to retirees as compared to regular employees.

Sincerely,

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Elbert Lin
Solicitor General

Christopher S. Dodrill
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