ALAN WILSON
ATTORNEY GENERAL

July 8, 2013

The Honorable MaryGail K. Douglas
Representative, District No. 41
56 Kabbard Road
Winnsboro, South Carolina 29180

Dear Representative Douglas,

You seek an opinion of this Office concerning the propriety of the allocation of funds by the County Council to individual council members for certain purposes. Specifically, your questions concern:

> 1) The appropriateness of county council members receiving, under separate payment, costs associated with health insurance premiums. Currently, the county reimburses these premiums to several council members who have coverage from other entities, such as state, county or private sources.
>
> 2) The propriety of county council authorizing payment of college tuition for a council member out of public funds.

Law/Analysis

Both of your questions regarding the use of county funds for the benefit of individual council members raise serious constitutional concerns. Article III, § 30 of the South Carolina Constitution provides:

> The General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law; but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrection.

Although the language of this provision expressly prohibits only the General Assembly from taking any such action, we have repeatedly advised that it also serves to limit political subdivisions, such as counties and municipalities, at least in the powers delegated to them by the General Assembly. Ops. S.C. Att'y Gen., 2012 WL 6218333 (Dec. 4, 2012); 2002 WL 1340428 (May 9, 2002).

Our Supreme Court has defined "extra compensation" for purposes of Article III, § 30 as "any compensation over and above that fixed by law or contract at the time the service was rendered." State ex rel. McLeod v. McLeod, 270 S.C. 557, 559, 243 S.E.2d 446, 447-48 (1978). This Office has repeatedly advised that the "[u]se of public funds to provide any form of compensation (extra compensation, insurance payments, pension payments, etc.) for public employees is unconstitutional if it is greater than

that which the State [or political subdivision] has a contractual or legal obligation to provide." Op. S.C. Att'y Gen., 2012 WL 6218333 (Dec. 4, 2012); see also Op. S.C. Att'y Gen., 1999 WL 397927 (Feb. 17, 1999). In addition, we have consistently advised that municipal corporations are generally prohibited by law from bestowing a gratuity on an officer or employee. Ops. S.C. Att'y Gen., 2012 WL 6218333 (Dec. 4, 2012); 1997 WL 205801 (Feb. 3, 1997).

Our State Constitution grants the Legislature the power to "provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties ...." S.C. Const. art. VIII, § 7. Consistent with this authority, the General Assembly has authorized members of a county council to receive "salary and compensation" set by ordinance. § 4-9-100. Thus, the salary a member of county council is entitled to receive is set not by contract but by local ordinance. See 62 C.J.S. Municipal Corporations § 474 ("An officer whose salary is fixed by law is entitled to that salary not as under a contract of employment but as incident to the office"). In addition, § 4-9-100 states "[m]embers may also be reimbursed for actual expenses incurred in the conduct of their official duties." As we stated in a previous opinion, "[c]ourts interpret strictly the right of public officials to be reimbursed for their necessary expenses incurred in the performance of their official duties." Op. S.C. Att'y Gen., 1987 WL 245448 (April 24, 1987). The general test for determining whether a public officer may be reimbursed for any particular expenses has been described as follows:

> The true test in all such cases is, was the act done by the officer relative to a matter in which the local corporation had an interest, or have an affect upon municipal rights or property, or the rights or property of the citizens which the officer was charged with an official obligation to protect and defend. No expenditure can be allowed legally except in a clear case where it appears that the welfare of the community and its inhabitants is involved and direct benefit results to the public.

4 McQuillin Mun. Corp. § 12:213 (3d ed.).

With the above in mind, we look to your specific questions concerning certain uses of county funds to the benefit of individual council members. Your first question concerns cash payments made to individual members in lieu of, or as reimbursement for, health insurance premiums where the individual member has opted not to participate in the group health insurance plan offered by the county to its officers and employees. We note that the Legislature has expressly authorized county governments to participate in the South Carolina Employee Insurance Program (EIP)[1] which makes group health, dental, and other insurance plans available to "active and retired employees of this State and its public school districts." § 1-11-710(A)(1). Under the EIP, the employing entity and the employee share the responsibility for making contributions toward health insurance premiums at a rate set by the South Carolina Public Employee Benefit Authority (PEBA). § 1-11-710(A)(2). Pursuant to § 1-11-720(A), the employees of counties are expressly made eligible to participate in the EIP and thus receive coverage under the state health and dental insurance plans.[2] However, a county must comply with the requirements established by PEBA in order to be eligible to participate in the state health and dental insurance plans. § 1-11-720(B).

---

[1] See generally §§ 1-11-703 et seq.

[2] According to the 2013 Insurance Benefits Guide issued by PEBA, page 9, "eligible employees" includes "elected members of the council of participating counties or municipalities." A copy of this guide is available at http://www.eip.sc.gov/ibg/.

Referencing the EIP guidelines, we advised in a prior opinion that any participating county or municipality is required to contribute toward the premium of a participating officer or employee at least as much as the State contributes for its officers and employees. Op. S.C. Att'y Gen., 2011 WL 3918183 (Aug. 3, 2011).

The validity of such legislation authorizing political subdivisions to participate in group insurance programs for the benefit of their officers and employees is generally discussed in 3 McQuillin Mun. Corp. § 12:173.82 (3d ed.):

> [A]n act empowering a [political subdivision] to contribute to premiums on group life and hospital insurance policies of officers or employees **who desire to take out the insurance** is not unconstitutional as granting the [political subdivision] power to increase the compensation of public officers, servants or employees during their term of office or as an attempt to authorize the [political subdivision] to lend credit or grant public money in aid of individuals.

(Emphasis added); see also Op. S.C. Att'y Gen., 2011 WL 3918183 (Aug. 3, 2011) (concluding a municipality's decision to participate in EIP pursuant to § 1-11-720 does not violate § 5-7-170[3]).

Consistent with the above, a member of county council is authorized under the law to receive, as part of his or her compensation, insurance benefits in the form of payments made by the county on the member's behalf toward a group health insurance plan the county has elected to participate in. However, such payments can only be made on behalf of a member who elects to participate in the plan offered; no provision of law of which we are aware permits a member who opt out of such a plan to receive cash payments in lieu of the amount that would have been paid toward the premiums on their behalf. Furthermore, we do not believe that members of council who opts out of participating in such group insurance plans may, in the alternative, be reimbursed by the county for expenses incurred in obtaining separate health insurance coverage. Such reimbursements are not, for purposes of § 4-9-100, "actual expenses incurred in the conduct of their official duties" under the rule of strict construction applicable to such provisions. Accordingly, it is our opinion that the only compensation a member of council may lawfully receive for the purposes of obtaining health insurance are payments made by the county on the member's behalf toward the premiums for a group health insurance plan in which the county participates. To otherwise make cash payments directly to members who opt out of such a group plan in lieu of payments toward their premium, or in the form of reimbursements for expenses incurred in obtaining separate insurance coverage, violates both Article III, § 30 and § 4-9-100.[4] In short, such payments to the

---

[3] Similar to § 4-9-100, § 5-7-170 provides the following with regards to the compensation of members of a municipal council:

> The council may determine the annual salary of its members by ordinance .... The mayor and council members may also receive payment for actual expenses incurred in the performance of their official duties within limitations prescribed by ordinance.

[4] This result is consistent with a prior opinion in which we concluded that a county council could not make cash payments directly to members of the county delegation to cover their expenses in lieu of providing them with "office space and appropriations necessary for the operation of the county legislative delegation" as required by a specific provision enacted as part of the home rule legislation. Op. S.C. Att'y Gen., 1979 WL 43593 (Sept. 18, 1979). To the extent this result is inconsistent with a prior opinion in which we concluded a county "may lawfully pay to those of its employees who elect not to participate in the County-sponsored group health insurance plan an amount equal to the cost the County of providing coverage under the plan," Op. S.C. Att'y Gen., 1983 WL 182004 (Sept. 20,

members are not authorized by the General Assembly and, we believe are a departure from the law for the county to pay these members in such a manner

The same conclusion applies to the use of county funds to pay the college tuition costs of an individual member of county council. The use of public funds in such a manner clearly bestows upon the individual member extra compensation in violation of Article III, § 30. Furthermore, such payments could not reasonably be construed as reimbursements for "actual expenses incurred in the conduct of ... official duties" under § 4-9-100. See 4 McQuillin Mun. Corp. § 12:213 (3d ed.) ("a public officer may not inform or educate him or herself generally at public expense"). Accordingly, it is our opinion that a county is prohibited by law from paying the college tuition costs of an individual member of council.

In addition, the use of county funds for the purposes specified in your letter is constitutionally suspect for other reasons. As we have previously stated, under our State Constitution "it is well-settled that the expenditure of public funds must be for a public, not a private purpose." Op. S.C. Att'y Gen., 2012 WL 1036301 (March 20, 2012); see also Elliott v. McNair, 250 S.C. 75, 86, 156 S.E.2d 421, 427 (1967) ("All legislative action must serve a public rather than a private purpose"). This principle is recognized in several constitutional provisions. See S.C. Const. art. X, § 14(4) ("General obligation debt may be incurred only for a purpose which is a public purpose and which is a corporate purpose of the applicable political subdivision"); S.C. Const. art. X, § 5 ("Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied"); S.C. Const. art. X, § 11 ("The credit of neither the State nor of any of its political subdivisions shall be pledged or loaned for the benefit of any individual"). As we stated in a prior opinion, Article X, § 11 "has been construed by the Court to prohibit the expenditure of public funds 'for the primary benefit of private parties.'" Op. S.C. Att'y Gen., 1983 WL 182057 (Nov. 16, 1983) (citing State ex rel. McLeod v. Riley, 276 S.C. 323, 278 S.E.2d 612 (1981); Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1886)); see also Op. S.C. Att'y Gen., 2008 WL 4829833 (Oct. 28, 2008) (stating Art. X, § 11 is violated "when public funds are appropriated to a private entity and such appropriation is not for a public purpose").

As previously indicated, the constitutional prohibition against the use of public funds for the primary benefit of a private party is not violated where a county makes contributions towards health insurance premiums for its officers or employees who wish to participate in a group health insurance plan the county is authorized to offer. See 3 McQuillin Mun. Corp. § 12:173.82, supra. However, in the absence of legislation specifically allowing a county to make cash payments to individual council members in lieu of contributions toward premiums on the approved group health insurance plan on their behalf, a court would most probably conclude that the use of public funds in this manner unconstitutionally benefits private parties, i.e., the individual council members.

Even more suspect is the use of county funds to pay the college tuition costs of an individual member of council. We have recognized in previous opinions that the promotion of higher education in a county generally serves a valid public and corporate purpose, Op. S.C. Att'y Gen., 2012 WL 1036301 (March 20, 2012), and that the "expenditure of public funds for tuition assistance generally meets the public purpose test." Op. S.C. Att'y Gen., 1986 WL 289767 (March 17, 1986). However, the 2012 opinion, as well as others previously issued, generally concerned programs designed to provide tuition assistance to the residents of the State or a political subdivision. The 1986 opinion concerned a tuition

---

1983), we expressly overrule that opinion. In any event, that opinion can be distinguished on the basis it concerned county employees who may receive certain compensation and benefits pursuant to contract, as opposed to the instant case involving elected members of county council whose salary and compensation is fixed by law and not by contract.

reimbursement policy adopted by a public service district for the purpose of encouraging its employees to take courses with "a legitimate connection or manifest relation" to the district's corporate purpose. No opinion of this Office or decision by our state appellate courts has ever sanctioned the expenditure of public funds to cover a single individual's college tuition costs. Furthermore, as previously referenced, 4 McQuillin Mun. Corp. § 12:213 states that "a public officer may not inform or educate him or herself generally at public expense ...." Accordingly, we believe a court would find that the use of county funds to pay the tuition costs of individual members of council is a violation of the Constitution.

We note that other provisions of law may be relevant to your questions concerning the legality of the manner in which county funds may or have been used. However, we believe our above conclusions sufficiently and decisively answer your questions. Thus, we find it unnecessary to further address the propriety of the use of county funds in manner presented in relation to any other provision of law.

Conclusion

It is our opinion that State law prohibits a county from using public funds to make cash payments directly to individual members of county council who elect not to participate in the group health insurance plan offered by the county in lieu of making payments toward the premiums for such plans on their behalf or as reimbursement for expenses incurred by such non-electing members in obtaining separate insurance. While only a court may so conclude with finality, we believe that such payments are unauthorized and that it is a departure from the law for the county to pay them. We are also of the opinion that State law prohibits county funds from being used to pay for the college tuition of individual council members. The use of public funds for such purposes grants such members extra compensation in violation of Article III, § 30 of the South Carolina Constitution. Furthermore, the use of county funds for such purposes violates § 4-9-100 as such expenditures cannot reasonably be construed as reimbursements for "actual expenses incurred in the performance of their official duties." Both forms of payment, in our opinion, also constitute the use of public funds for private purposes. Should a court determine that these forms of payments are prohibited by law as we believe they are, there may be personal liability for the wrongful receipt or payment of such funds. Op. S.C. Atty. Gen., 1997 WL 208002 (March 3, 1997).

Sincerely,

Robert D. Cook
Solicitor General

Harrison D. Brant
Assistant Attorney General