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Opinion 2016-01

June 21, 2016

The Honorable Daniel J. Cronin
Chairman, DuPage County Board
421 N County Farm Rd.
Wheaton, IL 60187

Dear Chairman Cronin:

You have asked my opinion as to the validity of the county board's current and previous practices regarding its determination of the compensation of its members and that of the other elected officials.

It is my opinion that the county board acted properly in adopting resolutions FI-O-0011-16, FI-O-0012-16, and FI-O-0013-16 on May 10, 2016. It is similarly my opinion that the board's "restatement" of benefits set forth by FI-O-0012-16 correctly reflects historical county board policy with respect to the compensation and other benefits it affords to elected officials.

My analysis of the propriety of the county board's establishment of compensation will begin with an overview of the county board's authority in this area as well as a clarification as to the meaning of the term "compensation" under Illinois law as it applies to elected officials. For reasons I will discuss later, I will address questions pertaining to the State's Attorney's compensation separately.

Authority to Determine Compensation

Section 4-10001 of the Counties Code authorizes the county board to fix the compensation of its members before the general election at which county board members are elected. 55 ILCS 5/4-10001. In counties with less than 2 million residents, including DuPage County, the county board determines the compensation of the county auditor, county clerk, coroner, recorder of deeds, sheriff, and treasurer in accordance with Division 4-6 of the Counties Code and within the limitations set forth by that Division. 55 ILCS 5/4-6001 *et. seq.* Like Section 4-10001, Section 5-1010 requires the county board to set the compensation of county officers at "a meeting of such board held before the regular election of the officers whose compensation is to be fixed." 55 ILCS 5/5-1010. Unlike most counties operating under township organization, the voters elect the chairman of the county board in DuPage County for a four-year term. The chairman is not a county board member and may not simultaneously serve as a county board member. Prior to 1982, and as is still the case in the overwhelming majority of Illinois counties, the county board elected its chairman for a two-year term from among its membership and the chairman continued to serve as

a member of the county board during his or her tenure as chairman. Because the county board has determined through its apportionment ordinances that the voters elect the county board chairman and that the county board chairman does not serve as a member of the county board, I believe that the position of county board chairman in DuPage County is a county officer. See 1970. Ill. Const. art. VII. § 4(c). Therefore, the provisions of Section 5-1010 also appear to apply to the compensation of the chairman of the county board in DuPage County.

In 1995, the General Assembly enacted the Local Government Officers Compensation Act, 50 ILCS 145/*et. seq.*, as part of a comprehensive reform of ethics in local government. The new law superseded the "meeting before the election" rule and required all units of local government, including counties, to fix the compensation of their officers at *least* 180 days before they begin their terms. 50 ILCS 145/2. Though this enactment, 180 days prior to the start of an officer's term became the floor, rather than the ceiling, on the amount of time that a unit of government can set that officer's Section 9(b) of Article VII of the Illinois Constitution of 1970 provides that "an increase or decrease in the salary of an elected officer of any unit of local government shall not take effect during the term for which that officer is elected." 1970. Ill. Const. art. VII. § 9(b).

The Clerk of the Circuit Court ("Circuit Clerk") is not a county officer. The 1970 Illinois Constitution regards Circuit Clerks as nonjudicial members of the judicial branch of State government. *Drury v. County of McLean*, 89 Ill. 2d 417 (1982). Nevertheless, Section 27.3 of the Clerk of Courts Act, 705 ILCS 105/ *et. seq*,. requires a county board to determine the compensation of the circuit clerk in its county subject to specific parameters. 705 ILCS 105/27.3. The regional superintendent of schools ("regional superintendent") also is not a county officer. The regional superintendent is the "chief administrative officer of an educational service region." 105 ILCS 5/3A-2. Section 3-2.5 of the School Code, 105 ILCS 5/ *et. seq.* permissively empowers a county board to "provide for additional compensation for the regional superintendent" if it chooses.

The Local Government Officers Compensation Act applies to the "compensation of elected officers of school districts and units of local government." By its own terms, this Act does not apply to Circuit Clerks who are members of the judicial branch of State government. 50 ILCS 145/2. Further, "the provisions of section 9(b) of article VII of the Illinois Constitution of 1970 do not apply to the circuit court clerk." 1973 Op. Atty. Gen. Ill. 171, No. S-639. While Section 13 of Article VI ("The Judiciary") prohibits the diminishment of salaries to take effect during a term of office, the restriction is limited to the salaries of judges. 1970. Ill. Const. art. VI. §14. Similarly, neither the Illinois Constitution nor State law denotes an "educational service region" as a unit of local government or as a school district. Thus, the Local Government Officers Compensation Act and the prohibitions contained in Section 9(b) of Article VII of the Constitution appear to be inapplicable to the salaries of regional superintendents.

Compensation Under Illinois Law

The leading case addressing elected official compensation in Illinois is *Harlan v. Sweet,* 139 Ill. 2d 390 (1990). In *Harlan,* the Illinois Supreme Court considered whether fixed annual stipend payments to county treasurers authorized by the General Assembly and paid from state funds could take effect during a treasurer's current term of office. The court focused its analysis on Section

9(b) of Article VII of the Illinois Constitution of 1970, which expressly prohibits increases or decreases in the *salaries* of local government officers, including county treasurers, during their term of office. 1970. Ill. Const. art. VII. § 9(b). The case turned on whether these "stipends" constituted salaries.

The *Harlan* court concluded that the legislatively adopted stipends would unconstitutionally increase the salaries of the treasurers if they became effective during their current terms. *Harlan,* 139 Ill.2d at 394. The court noted that its previous opinions consistently described the term "salary" as "a fixed, annual, periodical amount payable for services and depending upon the time of employment and not the amount of services rendered." *Id.* Since the stipends authorized by the General Assembly conformed to this description, the court reasoned "regardless of how the legislature has phrased it, [if the stipends] were effectuated, [they] would serve to increase the treasurers' salaries during their elected terms of office, which the constitution forbids." *Id.* at 390.

The *Harlan* court rejected the treasurers' urging to give meaning to the difference between the language in Article VII of the present constitution and its historical antecedent in the 1870 Illinois Constitution. The treasurers argued that because the previous constitution had prohibited mid-term changes in the "fees, salary or compensation" of county elected officials, the 1970 State Constitution's use of only the term "salary" for the same purpose was significant.

Of this, the court said the following:

> "Plaintiffs argue that the absence in the local government article of the same provision prohibiting compensation other than salary allows an increase in compensation other than salary for local government officials. We are not persuaded. We note first that the 'stipend' that the legislature has created is not compensation other than salary. We also note that the terms 'salary' and 'compensation' are virtually synonymous (*Cummings v. Smith* (1937), 368 Ill. 94, 99, 13 N.E.2d 69) and are used interchangeably in these provisions of the constitution. The term 'salary' is merely more commonly used to describe the payment that elected officials receive for their services, just as the term 'wages' is more commonly used to describe the payment that some laborers receive and 'commission' is the term used to describe the payment that some salespeople receive. It is simply hard to envision how these elected officials, who are paid by way of salary, can be given more money for the performance of their duties and have it be termed something other than salary. In fact, the 'no other compensation for their service provision in the executive article is merely designed for the same purpose as the provision in the local government article that eliminates the fee system, although stated differently. (Ill.Ann.Stat., 1970 Const., art. V, § 21, Constitutional Commentary, at 367-68 (Smith-Hurd 1971).) As such, we find plaintiffs' argument unpersuasive." *Id.* at 397-8.

The *Harlan* court held that the terms "salary," "stipend," and "compensation" are synonyms, which it defined as fixed, annual, periodical amounts payable for services depending on the time of employment, and not the amount of services rendered.

The *Harlan* court's approach is in accord with the General Assembly's treatment of compensation issues for county officers as well as for the Circuit Clerks and regional superintendents. The provisions of the Counties Code, the Clerk of Courts Act, and the School Code that authorize county boards to determine the compensation of these various officers, do so exclusively in terms of the annual salaries paid those officers and use the terms "salary and "compensation" interchangeably. The legislature's treatment of these terms is fully consistent with the *Harlan* court's analysis that the term "compensation" is synonymous with "salary."

I am aware that some individuals suggest that the General Assembly significantly broadened the definition of "compensation" through its enactment of Article XX of the Code of Civil Procedure ("Article XX") captioned "Recovery of Fraudulently Obtained Public Funds." 735 ILCS 5/20-101. Article XX's definitional section in relevant part states as follows:

> "As used in this Article:
>
> (1) 'Compensation, benefits or remuneration' includes regular compensation, overtime compensation, vacation compensation, deferred compensation, sick pay, disability pay, sick leave, disability leave, medical, dental, optical or other health benefits, pension or retirement benefits or any other pay, compensation, benefits, or any other remuneration." *Id.*

This approach urges us to conclude that through this enactment, the General Assembly defined the term "compensation," *by itself,* to mean "regular compensation, overtime compensation, vacation compensation, deferred compensation, sick pay, disability pay, sick leave, disability leave, medical, dental, optical or other health benefits, pension or retirement benefits or any other pay, compensation, benefits, or any other remuneration." I believe the General Assembly's own choice of language counsels strongly against this conclusion. It is clear to me that the General Assembly did not supply a definition for the *term* "compensation," rather it defined the *phrase* "compensation, benefits or remuneration." In fact, the General Assembly uses the phrase throughout Article XX but never uses the term "compensation" by itself. 735 ILCS 5/20-100 *et. seq.*

The clearest expression of the intent of a legislative body is the words it uses in its enactments. ("When interpreting a statute the primary function of [the] court is to ascertain and give effect to the intent of the legislature." (People v. Beam (1979), 74 Ill. 2d 240; see *MCI Telephone Corp. v. Illinois Commerce Comm'n* (1988), 168 Ill. App. 3d 1008.) The language used in the statute is the primary source for determining legislative intent. *People ex rel. Gibson v. Cannon* (1976), 65 Ill. 2d 366.) If the language is certain and unambiguous this court need not refer to the legislative history, but must enforce the statute as enacted. *Gibson*, 65 Ill. 2d 366." *Bus. & Prof'l People for the Pub. Interest v. Ill. Commerce Comm'n*, 146 Ill. 2d 175, 207, 585 N.E.2d 1032, 1044 (1991)). The General Assembly intended for Article XX to provide a cause of action in favor of governmental entities for them to recoup anything of monetary value that any person fraudulently obtained from a unit of local government or a school district. To facilitate this purpose, the legislature broadly defined the "umbrella" phrase "compensation, benefits or

remuneration" so as encompass virtually everything the three terms could collectively include and bring it into the scope and reach of Article XX.

Aside from the plain text of Article XX, there are at least two other items of significance that counsel against a conclusion that the General Assembly regards "compensation" differently than did the *Harlan* court. First, Section 20-101 of the Code of Civil Procedure which supplies a definition for "compensation, benefits, or other remuneration," does so only for the purposes of Article XX and not for other, more general purposes in Illinois law. 735 ILCS 5/20-101 *et. seq.* Even if Section 20-101(1) defined the term "compensation" as broadly as some suggest, that definition would not be dispositive of a discussion of compensation outside of Article XX. The second item of interest is the timing of the *Harlan* opinion itself. The Illinois Supreme Court rendered the *Harlan* opinion in late 1990 – four years after Public Act 84-1462, by which the General Assembly enacted Article XX, became law. When it decided *Harlan,* the court could have relied heavily on Article XX to guide its analysis, but it did not even mention the definition. If the Illinois Supreme Court believed Article XX was controlling, or in any way relevant, to its decision in *Harlan,* it would have at least cited to it.

Elements of the 2016 Ordinances

DuPage County Ordinances FI-O-0011-16, FI-O-0012-16, and FI-O-0013-16 (collectively "the 2016 Ordinances"), taken together, address five key concepts: 1) the salary paid to various elected officials in each of the next four subsequent fiscal[1] years, 2) the elected official's participation in various insurance programs, 3) the availability of a vehicle allowance for select elected officials, 4) the ability of elected officials to participate in statutorily-authorized pension programs, and 5) the ability of elected officials to participate in other benefits available to all county employees. I will address each of these concepts separately.

1) Salary Paid

Since at least 2000 – and likely before – the county board has made adjustments to the salaries of the various elected officials by approving a resolution establishing a salary schedule for the next succeeding four fiscal years. Typically, the county board adopted these salary resolutions in the spring of even numbered years for the offices appearing on the November general election ballot. FI-O-0012-16 and FI-O-0013-16 are similar to the previous resolutions in that they set forth salary schedules, however they also reference other forms of compensation or benefits not addressed in previous biennial resolutions. As these resolutions have always determined the annual amounts paid to elected officials for the performance of their duties in specific fiscal years, they clearly provided for the compensation of elected officials in the manner contemplated by law.

[1] The county's fiscal year begins on December 1, as do the terms of the county officers, the Circuit Clerk, and the State's Attorney following their elections. Any changes to their compensation coincide with the start of a new fiscal year. Because the terms of the chairman and members of the county board begin on the first Monday in December following their election, ordinances that set their compensation make their changes effective on the first Monday in December. The regional superintendents begin their terms on July 1. Ordinances that make changes to the additional compensation for the regional superintendent do so on July 1.

2) Insurance Participation

Section 5-1069 of the Counties Code broadly authorizes county boards to "self-insure, for the benefit of its employees, all or a portion of the employees' group life, health, accident, hospital, and medical insurance, or any one or any combination of those types of insurance." 55 ILCS 5/5-1069. Paragraph (e) of that section defines the "term 'employees' as…includ[ing] elected or appointed officials but does not include temporary employees." This provision of Illinois law became effective in October of 1975 pursuant to Public Act 79-357.

In 1977, the county board adopted at least one resolution providing for employee insurance coverage. FI-087-77. While there is anecdotal evidence that county elected officials, including members of the county board, participated in this coverage from its inception, I have not located nor been provided with documentation reflecting the actual date the practice commenced. What is clear is that the practice exists today and has existed since at least 1992. My staff has located two advice of counsel memoranda issued under State's Attorney Jim Ryan that provide contemporaneous evidence that county board members were participating in the insurance programs prior to 1992.

The resolutions pertaining to insurance that I have examined occasionally utilize the term "eligible employees" to describe who may participate in the insurance programs. It is my understanding that since at least 1992 – and likely well before then – the county board has understood the terms "eligible employees" or "employees" to include elected officials consistent with Section 5-1069(e). 55 ILCS 5/5-1069(e). County board members are and have been aware for years that elected county officials, including themselves, participate in the county's insurance programs. Local media too has from time-to-time reported on the practice. The county board, nevertheless, has never questioned the interpretation that elected officials are employees for insurance purposes, expressed disagreement with it, nor, until May 10, 2016, chosen to enact subsequent resolutions with more precise language.

In my opinion, the county board's interpretation of its resolutions is both reasonable and consistent with the authority Section 5-1069(e) confers. For this reason, I believe the county board properly authorized elected officials to participate in the county's insurance programs prior to May 10, 2016 when it approved FI-O-0011-16. In this respect, FI-O-0011-16 accurately restates county board policy.

Having determined that the county board properly established the insurance benefit, I will now address the question of whether the benefit constitutes compensation under Illinois law. If it does not, then the county board may eliminate or change the benefit at any time.

In 1974, Attorney General William Scott opined that employer-paid contributions for retirement and insurance programs *did not* constitute salary. 1974 Op. Ill. Att'y Gen. No. S-830. Similar to the analysis later conducted by the *Harlan* court, General Scott began his analysis of the question by reviewing a number of Illinois Supreme Court cases, as well as opinions of courts in other states, which analyzed the meaning of the term "salary." Noting that Black's Law dictionary defined salary as "a fixed periodical compensation paid for services rendered" and the Illinois Supreme Court's opinion that "salary is a fixed, annual, periodical amount payable for services

and depending upon the time of employment and not the services rendered," General Scott noted that

> "Implicit in these definitions of the word 'salary' is that an amount or sum of money is actually paid to the employee. Since employer contributions to insurance programs, whereby the employee is insured, and retirement plans, whereby the employee is the beneficiary, are never paid directly to the employee, these contributions do not fall within the scope of the definition of the word 'salary'" *Id.* at 4.

In light of the subsequent holding in *Harlan*, and the language used by the General Assembly in the Counties Code, the Clerk of Courts Act and the School Code, I am persuaded by General Scott's analysis that employer contributions for retirement and insurance plans do not constitute salary and therefore do not constitute elected official compensation under *Harlan*.

Four years after *Harlan,* Attorney General Roland Burris opined that the addition of health insurance benefits during an elected official's term of office constitutes a prohibited and unconstitutional increase in his salary. 1994. Ill. Op. Att'y Gen. No. 94-022. General Burris began his analysis with the observation that Illinois courts had not yet addressed the specific issue and briefly discussed a line of cases concluding with *Harlan* that held that "salary" and "compensation" were synonymous terms. He also noted that no Illinois court had addressed whether the constitutional prohibition against mid-term salary changes covered changes to "fringe benefits."

Finding no controlling precedent in Illinois law, General Burris turned to Ohio and discussed *State ex. rel. Parsons v. Ferguson,* 348 N.E.2d. 692 (Ohio 1976), an opinion rendered by the Supreme Court of Ohio. In *State*, the Ohio Supreme Court adopted the reasoning of one of its appellate courts rendered in 1969, and held that "fringe benefits may not constitute "salary," in the strictest sense of that word, but they are compensation." Persuaded by the Ohio court and the similarity of Illinois law to Ohio law, General Burris summarily concluded that fringe benefits are "clearly" part of an officer's compensation and that "coverage generally may not be initiated during the current term of office of the incumbent officers without violating the Constitution." *Id.* at 3. Two years later, Attorney General Jim Ryan went a step further and opined a public body must make any contemplated changes in the insurance coverage of its elected officials in accordance with the Local Government Officer Compensation Act – though he did not discuss General Burris's analysis. 1996 Ill. Att'y Gen. Op. No. 96-039.

While I find General Scott's approach to be more persuasive than General Burris's, I agree with General Burris that insurance benefits are valuable. As the Ohio Supreme Court noted, an office holder benefits financially when a portion of his or her health care costs are paid from public funds. *State. ex. rel. Parsons v. Ferguson,* 348 N.E.2d. at 693. I believe in principle that a mid-term provision of insurance coverage constitutes the type of activity by elected officials that Section 9(b) of Article VII of the Illinois Constitution was intended to prevent. The *Harlan* court noted that the constitutional prohibition against mid-term changes in compensation is premised on two principles: "(1) the power to increase one's salary (compensation) should not be used to influence

the performance of an officeholder, and (2) a person ought not to be able to increase his or her own salary (compensation)." *Harlan,* 139 Ill.2d. at 395. Certainly, public policy, in general, militates against mid-term changes in compensation.

Unfortunately, neither General Burris nor General Ryan discussed how to quantify changes in compensation when compensation is something other than salary paid in fixed periodic payments to an elected official. General Burris opined that a local unit of government could not initiate insurance coverage mid-term for an elected official unless it had authorized the coverage before the official began his term. General Ryan opined that a unit of local government could not suspend its payments for an elected official's insurance coverage during the official's present term. Both actions, the Attorneys General opined, constituted impermissible changes in compensation. Left unanswered, or perhaps unasked, is the question of whether a public body can make changes to the insurance coverage it offers all employees that affect an elected official during his or her term. Though General Ryan was specifically focusing on the discontinuance of employer-paid insurance benefits, a logical extension of his reasoning could prevent the county board from making any changes to an elected official's insurance coverage during his or her term of office. I am particularly concerned that this approach could have the practical effect of making it functionally impossible for a county to administer a self-insured program properly, like the one in place in DuPage County, when the group plan includes elected officials even though the General Assembly specifically authorized their inclusion in group insurance benefits. 55 ILCS 5/5-1069(e).

As you know, the county board has selected a third party plan administrator to manage the self-insured insurance program it sponsors for the benefit of county employees. Unlike in a conventional group insurance program, an employer that sponsors a self-insured program does not make fixed insurance premium payments on behalf of its employees. Instead, the employer pays insurance claims (other than extremely large claims) from a fund to which both the employer and the participant contribute. While a participant's contributions are fixed based on an annual actuarial estimation of what portion of the total risk pool that participant is expected to represent, the employer's contributions must always be sufficient to ensure that the fund can pay all qualifying claims made against it regardless of the initial estimation. A participant who makes no claim against his or her insurance plan, for example, does not trigger the expenditure of any public funds. Conversely, a participant with a chronic medical condition may make a series of large claims against the plan and represents a significant employer cost. Though an employee contributes specific, fixed and periodic amounts toward the self-insured fund based on the employee's selected insurance plan, the employer does not. In fact, the employer never pays individual claims identifiable by employee. Rather, the employer provides periodic lump sum payments to its third party plan administrator to cover all pending claims in the aggregate. For this reason, except in rare instances where an individual employee's claims are large enough to trigger the employer's "excess" insurance coverage, the employer is typically unaware of what specific employee is incurring what specific costs – a result consistent with the Health Insurance Portability and Accountability Act (HIPAA).

In the context of elected official compensation, a public employer's payments under its self-insured program are neither fixed nor periodic and vary depending on the aggregate claims made

by all participating employees, including elected officials. Even if HIPAA authorized a public employer to determine through its plan administrator what portion of its costs were attributable to a specific employee, and the employer was inclined to do so, the costs would depend entirely on the medical needs of the employee at any given time. In the context of a specific elected official, the monetary amount of the insurance benefit may vary widely during any given year based on that official's particular medical needs and the health plan he or she has selected.

Additionally, changes in federal and state law and the administrative rules that implement those laws directly and unpredictably influence the cost and availability of health insurance. The county board makes annual adjustments to its self-insured program to reflect regulatory and market conditions as well as to control the overall cost of the program – adjustments which are applicable to all program participants.

Cost management of a self-insured program is a complicated process that involves careful calibration of employer costs, employee costs, and available benefits in relation to the healthcare market. The county board, with the advice of its consultants, determines what types of coverage plans it will offer to its employees and how to allocate the anticipated costs between employer and employee. If insurance benefits are compensation, none of these changes could become effective for an elected county officer during that officer's term of office. This would be particularly problematic in situations where a third party plan administrator no longer offers a previously available plan or where market conditions make a plan too expensive for the county to offer on the same terms. The county board's plan management also includes determining whether it will use credits or surcharges to influence healthy lifestyle choices or provide an incentive for an employee to obtain their coverage elsewhere in the form of opt out payments. The county board makes these decisions with the goal of balancing the overall cost of the program and the benefits the plan provides its employees against budgetary pressures.

In recent years, these management efforts have led to the discontinuation of certain insurance plans, the introduction of new plans, rebalancing projected insurance costs between the county and its employees, and incentivizing employee participation in lower cost plans and various wellness programs. The county board made many, but not all of these changes, in response to new requirements that Congress enacted as part of the Affordable Care Act – changes which it could not have properly made if insurance benefits constitute compensation or were fixed for four-year periods.

Further, DuPage County employs approximately 2,200 employees. The limitations on changes in compensation imposed by the Local Government Compensation Act and Article VII, Section 9 of the Illinois Constitution apply to 25 elected officials. Some of these officers are elected for four-year terms, others for two-year terms, and as few as nine may face election during a given election cycle. If the insurance benefits available to an elected official constitute compensation that the county board cannot change during an official's term of office, then the county board would be required to maintain a myriad of overlapping insurance plans and pricing schedules to accommodate grandfathered elected officials. In addition to creating additional administrative costs, this result runs contrary to the very purpose of establishing a group insurance program in the first place.

As I have explained, I do not believe that health insurance benefits are necessarily a form of compensation under Illinois law. The approaches taken by Generals Burris and Ryan require a departure from the previous, and more rigid, understanding of compensation in favor of broader interpretation of the term. I believe this framework requires a different understanding of the concept of changes in compensation as well. If however insurance benefits are indeed compensation under Illinois law, the county board's resolutions dating to 1977 properly conferred that compensation upon its elected officials. The county should regard this compensation as "the ability to participate or not participate in the insurance benefits the county from time-to-time offers to its employees and on the same terms" rather than in terms of the specific programs or polices which the county board made available prior to the commencement of an elected official's term of office. This would appear to harmonize the Attorneys General's analysis and the public policy and constitutional bar against mid-term changes in compensation with the practical considerations associated with maintaining a group insurance program.

3) Vehicle Allowances

Prior to 1998, the county assigned vehicles to the county officers as well as to the Circuit Clerk and regional superintendent. It also provided a vehicle allowance to various county staff members. In April of 1998, the county board authorized a vehicle allowance for the county board chairman. FI-0081-98. In 1999, the county board authorized a vehicle allowance for the county treasurer in lieu of an assigned vehicle because his existing vehicle was due to be replaced. FI-0067-99. In November 2000, in addition to making vehicle allowances available to additional county staff members, the county board increased the vehicle allowance to $450. The county board's resolution also specifically provided that "...the County Board Chairman is authorized to, where mutually agreed to, substitute this [vehicle] allowance in lieu of an existing County vehicle for Elected Officials..." FI-0174-00. This was the last known action of the county board with respect to vehicle allowances for county elected officials until its adoption of the 2016 Ordinances. Nevertheless, the county board did acknowledge the ongoing existence of the allowances in every financial plan it adopted since 2008.

In general, a fixed vehicle allowance is regarded as compensation under Illinois law. In *DeSutter v. South Moline Township Board*, 96 Ill.2d. 372 (1983), the Illinois Supreme Court held that fixed expense accounts, for which the recipient need not account, constitute compensation for an elected official. This conclusion is entirely consistent with the court's later holding in *Harlan* given the nature of the fixed, annual, and periodic payments to the elected official. While I believe a similar conclusion should be drawn here, the allowances the county affords to its elected officials *may* be distinguishable since, with the exception of the chairman and the treasurer, the allowance is available *only in lieu of* a county-assigned vehicle. Regardless of whether the vehicle allowances constitute compensation, it is my opinion that the county board validly, although perhaps obliquely, approved them for countywide elected officials in 2000. Obviously, it would have been preferable (and extremely helpful) for the county board to have specifically identified, by title, the elected officers to whom the county had assigned a vehicle, since at the time, information as to who had a county vehicle would have been readily available. Fortunately, for the purposes of this opinion, the county's Division of Transportation was able to determine, based on fueling records,

that in 2001, the State's Attorney, Circuit Clerk, county clerk, coroner, recorder, and sheriff were still utilizing their county-assigned vehicles, and based on employee recollection, that the auditor and regional superintendent had recently turned in their vehicles. It is *extremely* unlikely that the county assigned any of these officers their first county vehicle *after* the county board authorized the allowance in lieu of in 2000. By 2008, based on the county's financial plans, it appears that most of the elected officials had transitioned from county vehicles to the vehicle allowance.

I believe that the county board properly established a vehicle allowance or a vehicle allowance in lieu of a vehicle for all of the "countywide" elected officials through Resolutions FI-0081-98, FI-0067-99, and FI-0174-00 in the amount of $450 per month. Further, because the county board had not repealed or superseded these resolutions prior to May 10, 2016, I believe they were still effective on that date. *See* 2000 Ill. Op. Att'y Gen. No. 00-013. FI-O-0011-16 therefore correctly restates these enactments.

4) Pension Participation

Article 7 of the Illinois Pension Code, 40 ILCS 5/*et. seq.*, creates the Illinois Municipal Retirement Fund (IMRF). The county has been a participating municipality in IMRF since 1937. FI-0042-92. The definition of "employee" with respect to IMRF includes a person who "[h]olds an elective office in a [participating] municipality." 40 ILCS 5/7-109(1)(c). An elected official becomes a "participating employee" upon filing notice with IMRF that he or she desires to participate in the fund. 40 ILCS 5/7-137(b)2. However, an elected official cannot become a "participating employee" if they occupy an office normally requiring performance of duty for less than 1000 hours per year" and the governing body of that unit of government has voted to exclude them from participation. 40 ILCS 5/7-137(e). In 1992, the county board excluded all positions, including those of elected officers, which require less than 1,000 hours per year from participation in IMRF.

Resolution FI-0042-92 determined that the State's Attorney, Clerk of the Circuit Court, the county officers, and the chairman and the members of the county board qualified for participation in IMRF as of 1937. [2] In 1997, the county board adopted Resolution FI-0014-97 which also provided that the same positions were eligible for participation in IMRF, and that elected officials could continue their participation in IMRF if the positions normally required 1,000 hours of duty per year. These resolutions evidence the county board's certification that the normal duties of the offices of aforementioned elected officials required at least 1,000 hours per year and therefore qualified officeholders for IMRF participation. Once the county board determines that the duties of a particular office requires the number of hours to qualify its holder to participate in IMRF, an officeholder is free to participate, or not participate, in accordance with the provisions of the Illinois Pension Code. Other than its authority and duty to determine the number of hours the duties of a given position normally require, a county board has no authority to permit or bar an elected official from participating in IMRF.

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[2] The regional superintendent is a "teacher" within the meaning of Section 16-106 of the Pension Code and by law participates in the Teachers' Retirement System (TRS) of the State of Illinois rather than IMRF. 40 ILCS 5/16-106(3). The county board is not required nor authorized to determine the regional superintendent's eligibility to participate in TRS.

FI-O-0011-16 provides that the county's elected officials may "participate in any pension plan authorized by the Illinois Pension Code." As the county board previously determined that all of the IMRF-eligible elected offices referenced in the resolution occupy offices the duties of which normally require 1,000 hours per year to perform, FI-O-0011-16 is an accurate restatement of county policy.

5) Other Benefits

The County also makes additional optional benefits to its employees. These optional benefits, include various deferred compensation programs, enhanced life insurance policies, prepaid legal services, or corporate employer discounts, and are offered through, but at no cost, to the county. Employees (or elected officials) who wish to participate in these programs do so at their own expense. All of these "optional benefits" are offered by private vendors and none that I am aware of contemplate the payment of any "salary" or "compensation" to a participating elected official. The county has at various times by resolution provided for these voluntary benefits. FI-165-88, FI-0141A-08, FI-0116-00.

For the reasons I have previously explained, I do not believe these benefits constitute compensation under *Harlan,* but the county board has nevertheless properly approved them at various times.

Implied Repeal of Previous Ordinances

I understand that there remains a question as to whether certain aspects of an elected official's compensation or benefits are extinguished when the county board adopts a subsequent resolution establishing a salary. For example, if the county board properly approved compensation in the form of car allowances in 2000, a question arises as to whether it implicitly sunset the car allowance two years later when it next adopted salary schedules with no mention of the allowance.

Under Illinois law, "[a]n implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act, and therefore the last expression of law prevails since it cannot be supposed that the lawmaking power intends to contradict and enforce laws which are contradictions. *Rosehill Cemetery Co. v. Lueder* (1950), 406 Ill. 458. It is also essential that the implication, to be operative, must be necessary." *Rosehill Cemetery Co. v. Lueder*, 406 Ill. 458 (1950), *Northwestern University v. State*, 56 Ill.App.3d 305, (1st Dist. 1977).

Further, "[r]epeal by implication is not favored, and even if there is an apparent inconsistency between two laws, they will be construed, insofar as possible, so as to preclude an implied repeal of the earlier by the later. *People v. Isaacs*, 37 Ill.2d 205 (1967). It is only when there is a clear repugnancy and both acts cannot be carried into effect that the former is impliedly repealed. City of *Geneseo v. Illinois Northern Utilities Co*., 378 Ill. 506 (1941); *Dingman v. People*, 51 Ill. 277 (1869)." *Northwestern University v. State*, 56 Ill.App.3d at 309.

Here, the county's various resolutions establishing salary schedules, insurance benefits, vehicle allowances and other similar benefits simply do not conflict with one another. For example, the county adopted standalone salary resolutions that do not address vehicle allowances and it adopted

resolutions establishing vehicle allowances that were silent on salary schedules. Even if there was some question as to any apparent inconsistencies, the rule in Illinois requires us to construe the provisions, to the greatest extent possible, to preclude an implied repeal of the earlier provision. The county has also never expressly repealed any of these previous resolutions or ordinances.

I am aware of no authority standing for the proposition that a county board is *required* to establish salaries for elected officials in advance of *each* election. In light of the State's policy against repeal by implication, it is my opinion that once the county board has established compensation by ordinance, that compensation remains in place under the terms of the ordinance until or unless the county board expressly repeals the previous resolution or adopts a subsequent resolution in direct and irreconcilable conflict with it. As I discussed previously, the Counties Code required county boards to set compensation by its meeting immediately prior to a general election. The Local Government Officers Compensation Act advanced this deadline to 180 days prior to the commencement of an officer's new term. These provisions evidence the legislature's desire to prevent local units of government from making last minute and perhaps improperly motivated changes to a likely-to-be-elected officer's salary. In requiring units of local government to make any changes in officer compensation six months advance of an election, the General Assembly prevented, or at least substantially mitigated the effects of this behavior.[3] I do not believe either provision prevents the county board from maintaining a compensatory status quo through inaction.

I believe this approach to be fully in accord with an opinion issued by Attorney General Jim Ryan in 2000. 2000 Op. Ill. Att'y Gen. No. 00-013. In this opinion, General Ryan examined whether a transportation assistance payment enacted by a municipality in 1993 was still valid for elected officials serving current terms in 2000. A municipality, even a home rule municipality, is subject to the provisions of the Local Government Officers Compensation Act. 50 ILCS 145/3. Most municipal elected officers serve four-year terms. 65 ILCS 5/*et. seq.* As was the case in 1993, voters elect municipal officers at consolidated general elections that occur in the spring of odd-numbered years. The municipality in question authorized transportation assistance payments on November 2, 1993. *Id.* at 2. Thereafter, the State conducted consolidated elections in 1995, 1997, and 1999. The Attorney General opined that if the municipality intended to treat the transportation assistance payments as additional compensation for elected officials when it approved the payments in 1993, it could not diminish or eliminate the payments during an officer's present term of office in 2000. *Id.* at 10 – 11. If the law provides that an elected official's compensation lapses, as some suggest, if a unit of local government fails to reestablish it prior the start of an official's term of office, then this transportation assistance payment would only have been available to elected officials elected in 1995 and only through the expiration of their terms in 1999. Under this analysis, no elected official, whether in elected in 1997 or 1999 and serving in 2000 would have been eligible for the payments. This was not the conclusion the Attorney General reached.

Thus, I am of the opinion that despite their omission from the biennial salary schedules, the vehicle allowance and other ancillary benefits remain in effect.

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[3] For most units of local government (other than counties), this six month deadline is well in advance of the last day for interested candidates to file petitions to run for office.

Compensation of the State's Attorney

The law treats the State's Attorney differently than it does other officials elected who are elected on a county-wide basis.

Like Circuit Clerks and regional superintendents, State's Attorneys are not county officers. "State's Attorneys are State officers under the language of the constitution, not…county officers." *Ingemunson v. Hedges*, 133 Ill.2d 364 (1990) (citing *Hoyne v. Danisch*, 264 Ill. at 470-72 (1914)). "[T] the office of State's Attorney is considered to be part of the executive branch of State government." *Nelson v. Kendall County*, 2014 IL 116303 (2014). Despite being part of the executive branch of State government, the Illinois Constitution discusses the compensation of State's Attorney's in its Judicial Article. Ill. Const. art. VI. §19. The Illinois Supreme Court has therefore held that State's Attorneys are not subject to the provisions of the Executive Article of the Constitution which govern changes in compensation. *Ingemunson,* 133 Ill.2d at 370. Since State's Attorneys are part of the executive branch of State government, they cannot be officers of units of local government or school districts. It necessarily follows that the compensation provisions of Article VII of the Constitution are not applicable to State's Attorneys either.

Though the provisions for the compensation of the State's Attorney are set forth in Division 4-2 of the Counties Code, those provisions provide that the now-abolished Compensation Review Board, rather than a county board must determine the State's Attorney's salary. 55 ILCS 5/4-2001. That same section also provides that it does not prevent the payment of additional compensation to the State's Attorney out of the treasury of the county as may be provided by law. This provision should not be construed as a grant of authority to the county board to provide the State's Attorney with additional compensation. Simply put, the provision does not prohibit additional compensation if State law otherwise authorizes it. Attorney General Burris furnished a well-reasoned opinion on this matter in 1993 and arrived at the same basic conclusion. 1993. Ill. Att'y Gen. Op. No. 93-007.

As you know, the county provides the State's Attorney with a vehicle allowance in lieu of a county vehicle, as well as access to its insurance programs. For the reasons I have outlined previously, I do not believe that insurance and pension benefits necessarily constitute compensation, though if they do, the county board established that compensation, as well as the vehicle allowance properly. The question then is whether the county board had the authority to confer these benefits upon the State's Attorney and if so, what the source of that authority is.

With respect to the vehicle allowance, Illinois law imposes on county boards the duty to "provide reasonable and necessary expenses for the use of the…State's attorney…" 55 ILCS 5/5-1106. The county board previously provided for the reasonable and necessary local travel expenses of the State's Attorney by assigning him a county vehicle for his use. In 2000, the county allowed a substitution of the vehicle allowance in lieu of a county vehicle (or mileage reimbursement). I recently learned that my predecessor nevertheless eschewed the allowance for many years and continued to utilize his assigned vehicle until 2009. The substitution of a vehicle allowance, though it assumes the character of compensation, is one of many methods the county board may have chosen to provide for the State's Attorney's local travel expenses. The county board apparently believed that this method would reduce its maintenance and administrative expenses. I

believe Section 5-1106 of the Counties Code confers sufficient authority on a county board to provide its State's Attorney with a vehicle allowance as a means of managing the State's Attorney's reasonable and necessary expenses.

With respect to insurance, and as I previously discussed, Section 5-1069 of the Counties Code expressly authorizes the county board to extend insurance coverage to employees including "elected and appointed officials." State's Attorneys are elected officials and, as I explained, it is my opinion that the county board validly authorized insurance benefits for elected officials. Even if I were to construe the term "elected officials" very narrowly and read it so as to include county elected officials, but exclude State elected officials, State's Attorneys nevertheless are paid their salaries and reimbursed expenses through their respective county. They are therefore employees of their county for payroll and tax purposes. For this reason, I am of the opinion that even if insurance benefits constitute compensation, State law authorizes the county board to permit its State's Attorney to participate in its group insurance programs.

Finally, with respect to State's Attorney's participation in IMRF, Section 7-145.1 of the Illinois Pension Code defines the terms "elected county officer" and "county office" as including the State's Attorney. 40 ILCS 5/7-145.1. Though the definition is limited to that Section and one other, it is clear from the context of Article 7 of the Pension Code that State's Attorneys may participate in IMRF pension programs. Moreover, the Pension Code also provides that "[all persons…who receive earnings from general or special funds of a county for performance of personal services or official duties within the territorial limits of the county, are employees of the county…" 40 ILCS 5/7-109. Thus to whatever extent participation in IMRF constitutes compensation, it is compensation expressly authorized by the Illinois Pension Code. As I noted above, the Illinois Pension Code determines the parameters for participation in its programs. The only role for the county board was to determine that the duties of the State's Attorney normally require at least 1,000 hours per year.

I am, of course, cognizant of the fact that I am opining on matters of law that directly affect me. Though I believe my analysis to be objective, if you would like me to seek the opinion of the Attorney General on these matters or other matters I have discussed, I will make such a request.

Conclusion

For the forgoing reasons, I believe the 2016 Ordinances are valid and enforceable. At the same time, albeit it from a philosophical rather than a legal perspective, I am of the opinion that members of the public should not need to rely on multiple resolutions, in some cases adopted decades apart, to find out what elected officials are being paid and in what attendant benefits they may participate. This is not the fault of this county board or any its predecessors but it is reflective of how relatively small incremental changes over the past four decades continue to have an impact years later. I suspect DuPage County is no different from many other counties in this regard. The DuPage

County Board took a very significant and helpful step in its adoption of FI-O-0011-16 and I hope it will continue in its efforts to provide greater clarity to the public on these matters.

Sincerely,

Robert B. Berlin
State's Attorney