Coates' Canons NC Local Government Law

Health Insurance for Retired Commissioners – A Constitutional Issue

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S.L. 2009-564 (SB 468) amends G.S. 153A-93, effective October 1, to permit counties to provide health insurance to retired county commissioners. The new act takes care of a statutory problem that appeared to prohibit providing such a benefit, but there remains a constitutional problem if a county attempts to use the statute to initiate the benefit for commissioners who have already retired from the board.

The original statutory problem arose because G.S. 153A-93(d) has expressly permitted counties to provide health insurance to former officers and employees who were receiving retirement benefits from the county under one of the state-operated retirement systems or a county-operated alternative that had been certified as actuarially sound. Because commissioners were not eligible to be part of the state retirement systems, the subsection did not authorize a county to allow retired commissioners to participate in the county's health insurance plan and no other statute did either. The amended section resolves the problem by permitting health insurance to be provided to retired officers and employees who are not part of a retirement system, as long as the benefitted person has obtained at least 10 years of service with the county before separation from service.

That's fine for current commissioners. A county can set up a program under which a current commissioner can be eligible for health insurance once he or she stops being a commissioner, as long as the commissioner has had the requisite ten years of service. But what of a currently retired

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commissioner, one who has the requisite ten years of experience but went off the board before the retiree health insurance benefit was approved. Can a county now extend health insurance to such a commissioner?

The case of Leete v. County of Warren, 341 N.C. 116 (1995), suggests that doing so may be unconstitutional. In Leete the county manager resigned to take another position, and in gratitude for his years of service the commissioners voted to award him a severance package worth six weeks' of his salary. When citizens sued to enjoin payment of the severance package, the Supreme Court held that payment would violate the Privileges and Emoluments clause of the State Constitution (Article I, § 32), because it was in effect additional compensation for past services, for which the county received no consideration – it was an unconstitutional gift.

The logic of the Leete opinion is that a current commissioner can be provided health insurance when he or she retires, assuming the ten years of service, because it will be deferred compensation for his or her current service. But providing the insurance to already-retired commissioners seems on all fours with what the county tried to do in Leete, giving additional compensation for past service, and for that reason it likewise would seem to be an unconstitutional gift.

I think this is true even if the retired commissioner pays the full cost of the premium. My understanding is that it is likely that adding older members to a health insurance plan – and retired commissioners are more or less likely to be older – will raise the cost of the policy to the government employer. Therefore, even if the already-retired commissioner pays the premium, there are additional costs to the county and those would constitute the gift.

David Lawrence is retired from the faculty of the School of Government. For questions about the subject of this blog post, please refer to our **list of faculty expertise** to identify the appropriate faculty member to contact.

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§ 153A-93. Retirement benefits.

(a) The board of commissioners may provide for enrolling county officers and employees in the Local Governmental Employees' Retirement System, the Law-Enforcement Officers' Benefit and Relief Fund, the Firemen's Pension Fund, or a retirement plan certified to be actuarially sound by a qualified actuary as defined in subsection (c) of this section and may make payments into such a retirement system or plan on behalf of its employees.

(b) No county may make payments into a retirement system or plan established or authorized by a local act unless the system or plan is certified to be actuarially sound by a qualified actuary as defined in subsection (c) of this section.

(c) A qualified actuary means a member of the American Academy of Actuaries or an individual certified as qualified by the Commissioner of Insurance.

(d) A county which is providing health insurance under G.S. 153A-92(d) may provide health insurance for all or any class of former officers and employees of the county. Such health insurance may be paid entirely by the county, partly by the county and former officer or employee, or entirely by the former officer or employee, at the option of the county.

(d1) On and after October 1, 2009, a county which is providing health insurance under G.S. 153A-92(d) may provide health insurance for all or any class of former officers and employees of the county who have obtained at least 10 years of service with the county prior to separation from the county and who are not receiving benefits under subsection (a) of this section. Such health insurance may be paid entirely by the county, partly by the county and former officer or employee, or entirely by the former officer or employee, at the option of the county.

(d2) Notwithstanding subsection (d) of this section, any county that has elected to and is covering its active employees only, or its active and retired employees, under the State Health Plan, or elects such coverage under the Plan, may not provide health insurance through the State Health Plan to all or any class of former officers and employees who are not receiving benefits under subsection (a) of this section. The county may, however, provide health insurance to such former officers and employees by any other means authorized by G.S. 153A-92(d). The health insurance premium may be paid entirely by the county, partly by the county and former officer or employee, or entirely by the former officer or employee, at the option of the county.

(e) The board of commissioners may provide a deferred compensation plan. Where the board of commissioners provides a deferred compensation plan, the investment of funds for the plan shall be exempt from the provisions of G.S. 159-30 and G.S. 159-31. Counties may invest deferred compensation plan funds in life insurance, fixed or variable annuities and retirement income contracts, regulated investment trusts, or other forms of investments approved by the Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan. (1973, c. 822, s. 1; 1981, c. 347, s. 1; 1991, c. 277, s. 1; 2009-564, ss. 1, 2.)