THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

April 20, 1988

Mr. Kenneth H. Ashworth
Commissioner
Coordinating Board
Texas College and University
System
P. O. Box 12788
Austin, Texas 78711

Dear Mr. Ashworth:

This is in regard to letter opinion LO-88-41 issued by this office on April 12, 1988 in response to your request for an opinion (RQ-1233) on the amounts state junior and senior colleges are required to contribute to staff insurance premiums under article 3.50-3 of the Insurance Code.

We are withdrawing LO-88-41 and hope to issue a substitute opinion soon.

Very truly yours,

Rick Gilpin

Rick Gilpin, Chairman
Opinion Committee

RG/WW/er

#1897

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April 12, 1988

Mr. Kenneth H. Ashworth
Commissioner
Coordinating Board
Texas College & University
System
P. O. Box 12788
Austin, Texas 78711

LO-88- 41

Dear Commissioner Ashworth:

You ask what amount a junior college is required to contribute monthly in 1988 and 1989 for each employee or retiree toward group insurance premiums under Texas Insurance Code, article 3.50-3 (Texas State College and University Employees Uniform Insurance Benefits Act), in light of the gubernatorial veto of the item appropriating amounts for such benefits in the 1988-1979 appropriations act, Acts 1987, 70th Leg., 2nd C.S., ch. 78, p. 111-35.

The term "employee" as used in article 3.50-3 includes retirees. Id., sections 3(a)(2) and (4).

We note at the outset that article 3.50-3 of the Insurance Code has been substantially amended since our consideration of the provisions of Insurance Code article 3.50-3 in Attorney General Opinions MW-215 (1980) and JM-115 (1983). Section 2(b) of the act now declares that the act's purpose is to enable retention and attraction of competent employees by providing them with basic life, accident, and health insurance coverage "comparable to," rather than "at least equal to," that provided in private industry or to state employees under the Texas Employees Uniform Group Insurance Benefits Act. Acts 1985, 69th Leg., ch. 140, §1. Section 4(b)(4)(A) of the act now similarly provides that the administrative council shall determine basic coverage standards "comparable to," rather than "at least equal to," those in private industry and for state employees. Id., §2.

Section 11, prior to its amendment in 1985, provided that the premium for basic coverage might not exceed the amount of the employer contribution, i.e., that the employer contribution must fully cover the premium for basic coverage. That provision was deleted from section 11 in 1985 (Id., §1) and language added providing a formula for calculating the respective contributions of the employer junior college and the employee toward the cost of basic coverage. The amended language also provides that "optional" coverage must be made available at no cost to the employee if the cost of "basic" coverage exceeds the amount the Legislature appropriated therefor.[1] Section 11 now reads:

> No eligible employee shall be denied enrollment in any of the coverages provided by this Act; provided, however, that the employee may waive in writing any or all such coverages. Each policy of insurance shall provide for automatic coverage on the date the employee becomes eligible for insurance. From the first day of employment, each active full-time employee who has not waived basic coverage or selected optional coverages shall be protected by a basic plan of insurance coverage automatically. If the cost of an active employee's basic coverage exceeds the amount appropriated by the legislature for an employee, the institution must provide optional coverage at no cost to the employee. If the employee chooses the basic coverage rather than optional coverage, the institution may deduct from or reduce the

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1. "Optional coverage" is not defined in the act. However, section 3(b) of the act empowers the administrative council "to define by rule any words and terms necessary in the administration of this Act." It would appear that section 11, as amended, now requires the institution to offer "optional coverage" (necessarily a lower level of coverage than "basic coverage") at no cost to the employee, when the premium for "basic coverage" would be such that an employee contribution would be required to cover its costs, and that the standards of such "optional coverage" would be determined by the administrative council.

> monthly compensation of the employee up to one-half of the amount that exceeds the state's contribution for an employee, and the institution shall pay the difference. Each employee who is automatically covered under this section may subsequently retain or waive the basic plan and may make application for any other coverages provided under this Act within institutional and administrative council standards.

It is clear from a reading of section 11, that where the employee chooses basic coverage, a deduction from his salary to cover the cost of the premium may not exceed one half the amount by which such premium exceeds the state's contribution for such employee. For example, if the state's contribution were zero, no more than one-half the cost of the monthly premium could be deducted from the employee's monthly salary. The balance of the cost of the premium would have to be paid for by the institution from other funds available to it.

The next question is then: How much is the state's contribution for 1988-1989, the biennium at issue here, for junior college staff insurance benefits? It is our opinion that the state contribution for 1988-1989 for junior college staff insurance benefits is zero. The appropriations act for 1988-1989 itemized a state appropriation of $21,093,960 for such benefits for 1988 and $24,258,054 for 1989. See Acts 1987, 70th Leg., ch. 78, 2nd C.S., art. III, at 928. These items were vetoed by the governor in his veto message of August 6, 1987, pursuant to the governor's constitutional veto power. Tex. Const. art. IV, §14.

"The executive, while in the exercise of the veto power, is exercising a legislative function, yet the authorities are uniform in holding that he has no power to construct legislation. His authority is purely negative." Fulmore v. Lane, 140 S.W. 405, 412 (Tex. 1911). Though the governor in his veto message stated that his intent was "not to eliminate group insurance premiums for staff" and that these premiums "should be paid through funds allocated to each individual school," we believe that this language to the extent that it attempted to go beyond the mere negation of the appropriations for staff insurance benefits and to, in the words of Fulmore, "construct" legislation, was without legal effect. Therefore, in light of the foregoing discussion, a junior college must contribute at least half of the cost of premiums for basic

insurance coverage for staff, and an amount up to one half of such cost may be deducted from the salaries of employees opting for "basic" coverage (subject, of course, to the employees' written authorizations for such salary deductions pursuant to section 12 of the act). See also, Mutchler v. Texas Department of Public Safety, 681 S.W.2d 282 (Tex. App. - Austin 1984, no writ).

Finally, you asked what contribution to staff insurance premiums senior colleges are obligated to make in 1988 and 1989, there being no itemized appropriation for such senior college staff insurance benefits in the appropriations act. Acts 1987, 70th Leg., 2nd C.S., ch. 78. In our opinion, there was no state appropriation for senior college staff insurance benefits in the appropriations act. Therefore, the conclusion reached above with respect to junior college contributions to basic coverage staff insurance benefits applies as well to senior colleges, i.e. a senior college must contribute at least half of the cost of premiums for basic coverage, and an amount up to one half the premium cost may be deducted from the salary of an employee who has opted for basic coverage.

You also asked whether such institutions were required to contribute amounts to staff insurance benefits calculated in relation to the appropriation passed by the legislature, which amounted to $100 per month per employee in 1988 and $115 per month per employee in 1989. In our opinion, the appropriations passed by the legislature and subsequently vetoed by the governor have no relevance to the obligation of an institution to contribute to staff insurance benefits.

You cite in connection with your question the first sentence of section 12 of Insurance Code article 3.50-3, which reads:

> Each institution and agency covered under the provisions of this Act shall contribute monthly to the cost of each insured employee's coverage no less than the amount appropriated therefor by the legislature in the General Appropriations Act.

Section 12 refers to the "amount appropriated . . . by the Legislature" subject to gubernatorial veto. The appropriation for staff insurance benefits for 1988-1989 was zero, as discussed above. Although the section 12 language does not expressly refer to the veto power, we believe this

presents no problem. Such language without the express qualification "subject to gubernatorial veto" also appears in the Texas Employees Uniform Group Insurance Benefits Act, article 3.50-2, section 14(a) of Insurance Code:

> The State of Texas shall contribute monthly to the cost of each employee's group coverages such amount as shall be appropriated therefor by the legislature in the General Appropriations Act. (Emphasis added.)

Were we to read this language as providing that the state shall contribute whatever amount the legislature passes in the appropriations act regardless of a subsequent gubernatorial veto of such amount, the provision would constitute an unconstitutional attempt by the legislature to circumvent the governor's veto power. Tex. Const. art. IV, §14. We have no difficulty finding a preferred constitutional meaning in such a provision, i.e., that it refers to the appropriation by the legislature subject to gubernatorial veto. McKinney v. Blankeship, 282 S.W.2d 691 (Tex. 1955).

Very truly yours,

Rick Gilpin

Rick Gilpin
Chairman
Opinion Committee

APPROVED: OPINION COMMITTEE
Prepared by William Walker
ID#1897, 3649)

RQ-1233