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January 27, 2015

CONFIDENTIAL AND ATTORNEY-CLIENT PRIVILEGED

VIA EMAIL & U.S. MAIL
bscroggins@mtsac.edu

Dr. Bill Scroggins
President
Mt. San Antonio College
1100 North Grand Avenue
Walnut, CA 91789

Re: ***Opinion re Board Policy 2730 and the Continued Funding of Health & Welfare Benefits for Former and Retired Board of Trustee Members***
Client-Matter: MO160/001

Dear Dr. Scroggins:

You have asked for a written legal opinion regarding whether or not Mt. San Antonio College ("Mt. SAC" or the "College") can fund continuing health and welfare benefits ("health benefits" or "retiree medical") for its former and retired Board of Trustee members ("Board members" or "elective members") pursuant to the conditions set forth in Board Policy 2730 ("BP 2730").

I. QUESTIONS PRESENTED

(1) May the College fund health benefits for a Board member who has left the elected position, but who did not retire and continues to work in government service after separation from the Board?

(2) May the College fund health benefits for a Board member who has retired from the elected position pursuant to the conditions set forth in BP 2730?

II. SHORT ANSWERS

(1) No, the College cannot provide health and welfare benefits to former elective members because a former elective member does not qualify for continued benefits

under the Public Employees' Medical and Hospital Care Act (Government Code section 22760, *et seq.*, "PEMHCA"). Since the College contracts with the California Public Employees' Retirement System ("CalPERS") to provide the College's health benefits plans, those plans are governed by PEMHCA. In order to satisfy PEMHCA's eligibility requirements upon separation from Board service, the former Board member must qualify as an "annuitant." To qualify as an annuitant, the Board member must retire from the Board within 120 days of separation from service and receive a retirement allowance from the College. Elected Board members are excluded by statute from membership in CalPERS for retirement benefits and therefore, cannot opt-in to CalPERS while on the Board. Therefore, they will not be eligible to receive a CalPERS retirement benefit and cannot satisfy the definition of annuitant. (*See* Gov. Code § 20322).

(2) No, a Board member has no basis to receive retiree health benefits if he or she cannot opt-in to CalPERS, the College's retirement system. A Board member cannot technically "retire" from Board service because in order to retire, the Board member must have been eligible to opt-in to CalPERS membership in the first instance. PEMHCA requires that an individual qualify as an annuitant to be eligible for continued health benefits. In turn, an individual cannot qualify as an annuitant unless he or she was a member of the College's retirement system. Therefore, because a Board member cannot opt-in to CalPERS, he or she cannot qualify as an annuitant to satisfy PEMHCA eligibility upon separation from Board service.

III. FACTS

The Board currently maintains a Policy that provides,

BP 2730 Health Benefits

Reference:

Government Code Section 53201, 53205

A program of health and welfare benefits including dental, vision, and life insurance with premiums paid by the College shall be provided to members of the Board of Trustees while serving in office.

In accordance with Government Code Section 53205, the above benefits shall be continued for each member of the Board of Trustees, including one dependent on record at time of termination of service:

(1) Board member who took office prior to December 31, 1995, and who has a minimum of five years of Board service. The Board member and dependent

must have been participants in an approved College plan at the time of termination.

(2) Board members taking office after January 1, 1996, shall have College-paid health and welfare benefits continued for the member only; must render a minimum of ten years of service to the college prior to termination of service from the College and must be a participant in an approved College medical plan at the time of termination.

BP 2730 was adopted on March 24, 2004.

The College first adopted a policy providing Board members with health and welfare benefits in July 1992. That policy, Board Policy 105.2, was in place on January 1, 1994 and read, "A program of health and welfare benefits with insurance premiums paid by the District shall be provided to members of the Board of Trustees while serving in office." BP 105.2 did not provide continuing health and welfare benefits for former Board members.

The College would like advice on BP 2730's compliance with the Government Code, particularly sections 53201 and 53205. More specifically, the College is unclear as to its ability to fund health benefits for a former trustee who has left the elected position, but did not retire from the Board and continues to work in government service.

IV. ANALYSIS

A. The College May Not Provide Continued Health Benefits to *Former* Elected Members Because a Former Board Member Does Not Qualify as an Annuitant Under PEMHCA.

Generally, Government Code Section 53201 governs the continuation of health benefits for former and retired elected officials. However, as explained below, when a local government agency contracts with CalPERS as its health plan provider, PEMHCA governs. Although our ultimate conclusion is that the College should look to PEMHCA to determine eligibility for continued health benefits, an analysis of Government Code Section 53201 is prudent in the event that the District were to ever contract with a provider other than CalPERS.

i. Government Code Section 53201 Distinguishes Between Former and Retired Board Members.

Government Code section 53201 authorizes the governing body of a local agency to provide health and welfare benefits to its officers, employees, retired employees, and retired members of its governing body, and former elective members of a legislative body. In particular Government Code section 53201, subdivisions (a) and (b) currently provide that:

> (a) The legislative body of a local agency, subject to conditions as may be established by it, may provide for any health and welfare benefits for the benefit of its officer, employees, retired employees, and retired members of the legislative body, as provided in subdivision (b), who elect to accept the benefits and who authorize the local agency to deduct the premiums, dues, or other charges from their compensation, to the extent that the charges are not covered by payments from funds under the jurisdiction of the local agency as permitted by Section 53205.
>
> (b) The legislative body of a local agency may also provide for the continuation of any health and welfare benefits for the benefit of former elective members of the legislative body who (1) served in office after January 1, 1981, and whose total service at the time of termination is not less than 12 years, or (2) have completed one or more terms of office, but less than 12 years, and who agree to and do pay the full costs of the health and welfare benefits.

In 1994, the Legislature amended Government Code section 53201, by adding subdivision (c). That subdivision currently states:

> (1) Notwithstanding any other provision of law, a legislative body of a local agency that provided benefits pursuant to subdivision (b) to former elective members of the legislative body [before] January 1, 1995, shall not provide those benefits to any person first elected to a term of office that begins on or after January 1, 1995, unless the recipient participates on a self-pay basis, as provided in subdivision (b).[1]
>
> (2) A legislative body of a local agency that did not provide benefits pursuant to subdivision (b) to former elective members of the legislative body before January 1, 1994, shall not provide those benefits to former elective members of the legislative body after January 1, 1994, unless the recipients participate on a self-pay basis.
>
> (3) A legislative body of a local agency that provided benefits pursuant to subdivision (b) to former elective members of the legislative body before January 1, 1994, may continue to provide those benefits to those members who received those benefits before January 1, 1994. (Gov. Code, § 53201(c)(1)-(3), emphasis added.)

Government Code section 53205 provides that the legislative body of a local agency may "authorize payment of all, or such a portion as it may elect, of the premiums, dues, or other

[1] When the Legislature amended the statute in 1995, it inadvertently omitted the word "before" from section 53201, subdivision (c)(1). (*See* 85 Ops.Cal.Atty.Gen. 63. 64, fn. 2 (2002)).

charges for health and welfare benefits of . . . former elective members specified in subdivision (b) of Section 53201 and retired members of the legislative body subject to its jurisdiction."

Government Code section 53201 distinguishes between "retired members" of a legislative body and "former elective members" of that body. The term "former elective member" has been interpreted, for purposes of Government Code section 53201, subdivision (b), to mean those former members of the legislative body who are not in office because of any reason other than retirement (e.g., defeated, did not run for office again, etc.) (*See* 62 Ops.Cal.Atty.Gen. 631 (1979)).

It should be assumed that when the legislature added subdivision (c) to Government Code section 53201, it was aware of the distinction drawn between retired elected members and former elected members. (*See People v. McGuire* (1993) 14 Cal.App.4th 687, 694).[2] Therefore, it is more likely than not that the term "former elective members" as used in Government Code section 53201, subdivisions (b) and (c) would refer only to former members of the Board who are no longer members because of any reason other than retirement.

The Attorney General has interpreted these provisions in the context of providing retiree medical benefits to city council members. (*See* 5 Ops. Cal. Atty. Gen. 63 (2002)). There, the Attorney General stated that subdivision (c)(2) authorizes a city council, which did not have a policy of providing continuing health and welfare benefits to former members prior to January 1, 1994, to provide continuing benefits to members who leave office *only if the former member paid for the benefit him or herself.* The Attorney General interpreted subdivisions (c)(1) and (c)(3) to permit agencies to continue funding benefits for former members whom the agency provided for prior to January 1, 1994 and who were first elected to office prior to January 1, 1995. For these members, their rights to continuing health benefits had vested. For those members first elected to office after January 1, 1995, such members could not take advantage of subdivision (c)(1); rather, the city could only provide them health benefits if members paid for the full premiums themselves ("self-funded").

However, Government Code section 53201, subdivision (b) sets out threshold requirements before an agency may permit membership in its retiree medical benefit plan. First, the College may pay for continuing benefits only if the elective member served in office after January 1, 1981 with a total tenure of more than twelve (12) years. Otherwise, the College may allow a former elective member to participate on a self-pay basis, but only if the former elective official completed at least one term in office and served less than twelve (12) years.

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[2] The cases setting forth the rule that, when amending a statute, the legislature is presumed to adopt the judicial construction of language left unchanged, by definition, generally deal with a court's interpretation. However, given the limited case law on this subject, it is our opinion that the amendment of this statute in light of the prior interpretation in an Attorney General's opinion of "former elective member" will likewise be deemed an adoption of such interpretation by the Legislature.

Consequently, were Government Code 53201 to apply, it is our opinion that the College may only pay for the benefits of former elective members if the College provided such benefits to former elective members prior to January 1, 1994. If the College did not have such a policy on January 1, 1994, the College may only provide continued benefits to former elective members on a self-pay basis and only if the former elective official served at least one term in office and no more than twelve (12) years on the Board.[3]

ii. To Ensure Adherence to Government Code Section 53201, Board Policy 2730 Must Be Analyzed in Relation to Board Policy 105.2.

The College first adopted Board Policy 105.2 providing members of the Board with health benefits, in July 1992. This same policy was in place on January 1, 1994 and read, "A program of health and welfare benefits with insurance premiums paid by the District shall be provided to members of the Board of Trustees while serving in office." Therefore, the only Board members entitled to benefits before January 1, 1994 were current members, *not* former members.

On the other hand, the College's current health benefits policy, BP 2730, provides that the College will continue to provide health and welfare benefits to former members at the "time of termination of service" if (1) the Board member took office prior to December 31, 1995 and served at least five years, (2) the Board member took office after January 1, 1996, rendered a minimum of ten years of service, and participated in the College medical plan (CalPERS). BP 2730 was not adopted until March 24, 2004.

BP 105.2 was in place in between 1992 and 2004 and does not mention *former* or *retired* members at all. Therefore, it is our opinion that pursuant to Government Code section 53201, subdivisions (c)(1) and (2), were Government Code 53201 to govern, the College may only provide health and welfare benefits to former elective members if the former members participate on a *self-pay basis*. Former members may only participate on a self-pay basis if they served at least one term in office and served less than twelve (12) years in office. (*See* Gov. Code § 53201(b)). Furthermore, Government Code section 53205 permits a legislative body to fund all, or a portion of, health benefits for former members only to the extent permitted by Section 53201. Thus, because subdivision (c)(2) does not permit the College to fund former Board member health benefits, Section 53205 does not authorize the College paying for health insurance of former Board members.

The above analysis would apply if the College contracted with a private agency to administer health and retirement benefits. *However*, because the College contracts with

[3] We recognize that it seems counter-intuitive to allow a former elected official to participate on a self-pay basis if he or she were a member of the Board for no more than twelve years, but not to provide this option to a former Board member who served more than twelve years. While this may be the case, a reading of the statute appears to support such an interpretation. We have found no legal opinions supporting the contrary conclusion.

CalPERS for its retiree health plan, it is our opinion that the questions presented should be analyzed under PEMHCA's statutory scheme rather than Government Code section 53201.

iii. PEMHCA's Statutory Scheme Applies When Determining Eligibility for Continued Health Benefits.

Since the College contracts with CalPERS to provide health insurance to employees and retirees, PEMHCA dictates the requirements for providing former or retired members with continued health benefits. (*See* Gov. Code § 22750, *et seq.*).

The California Attorney General opined in a letter dated May 5, 1993, that PEMHCA provides the statutory scheme for determining eligibility for continued health insurance benefits separate from the requirements of Government Code section 53200, *et seq.*, which apply when private insurance is purchased. (76 Ops.Cal.Atty.Gen. 91 (1993)). The Attorney General stated that, "[i]nitially, we note that PEMHCA authorizes an alternative method for local agencies in providing health benefits to their personnel…it may elect to operate solely under PEMHCA; or it may elect to use both statutory schemes for separate coverages." A 2007 Attorney General opinion further developed the 1993 analysis and opined that Government Code section 53201 should not be interpreted so as to conflict with PEMHCA's provisions. (*See generally* 90 Ops.Cal.Atty.Gen 32 (2007)). Although Attorney General opinions are not binding precedent, they are likely to be persuasive authority given the dearth of published Court of Appeal decisions on this topic.

As discussed below, in the instant case, applying Government Code section 53201 to former Board members would violate PEMHCA's requirements. Therefore, the College should look to PEMHCA's statutory scheme to determine if BP 2730 is enforceable.

iv. Former Board Members Do Not Satisfy PEMHCA's Requirements to Qualify for Continued Health Benefits.

Although PEMHCA is administered by CalPERS, it remains completely separate and distinct from CalPERS to the extent that a person may be eligible for PEMHCA health benefits in some instances, but ineligible for membership with CalPERS for retirement benefits. However, in other circumstances, ineligibility for CalPERS retirement benefits may dictate ineligibility for PEMHCA health benefits. (*See* Gov. Code § 20322, subd. (c); *see also* Gov. Code § 22772, subd. (a)(2)).

In order to qualify for health benefits under PEMHCA, a former or retired Board member must qualify as an "annuitant." The statute defining "employees" for the purposes of PEMHCA was recently amended by Senate Bill (SB) 987 to state that an employee is one "who is employed by a contracting agency and participates in a publicly funded retirement system provided by the contracting agency, *or an officer or official of a contracting agency.*" (Gov. Code § 22772(a)(2) [emphasis added]). This definition allows a Board member to be covered as an "employee" under PEMHCA, while serving on the Board, even though the Board member is not eligible for CalPERS membership for retirement benefits. (Gov. Code § 20322, subd. (c)). Under PEMHCA, for purposes of this analysis the relevant definition of "annuitant" includes,

> A person who has retired within 120 days of separation from employment with a contracting agency as defined in Section 22768 or, if applicable, consistent with the provisions of subdivision (b) of Section 22893, and who receives a retirement allowance from the retirement system provided by that employer, or a surviving member of who receives the retirement allowance in place of the deceased. (Gov. Code § 22760, subd. (c)).

Therefore, to qualify as an annuitant, a former Board member must receive a retirement allowance from the College's retirement system, CalPERS.[4] A lack of eligibility for a retirement allowance means that a Board member cannot receive retirement benefits. In other words, a Board member must be able to opt-in to CalPERS membership, and do so while serving on the Board in order to qualify for PEMHCA upon separation from Board service. As stated previously, the Board members are not eligible for CalPERS membership and cannot qualify as annuitants. Once the Board member leaves service and no longer qualifies as an employee, he or she will have no statutory basis to continue enrollment in PEMHCA.[5]

v. While Contracting with CalPERS, the College May Not Maintain Another Health Benefit Plan or Program for Its Board Members to Bypass the Limitations Under PEMHCA.

The College cannot avoid the PEMHCA limitations on the definition of "annuitant" by contracting with another insurer to provide coverage for former Board members. Generally, a contracting agency electing to become subject to PEMHCA for all or a class of employees and annuitants may not maintain any other health benefit plan or program offering hospital and medical care for those same employees and annuitants. (*See* Gov. Code, § 22934). There are certain exceptions to this provision, including: (1) plans operating on July 1, 2002 which satisfy specific requirements established by CalPERS; (2) self-insured plans operating on January 1, 2003 which satisfy specific requirements established by CalPERS; and (3) plans offered to employees and annuitants of bargaining units which are not eligible to participate in CalPERS health care plans. (*See* Gov. Code, § 22934, subd. (b) and (g)). In order to qualify under either the first or second exception above, CalPERS requires that the plan provide health insurance benefits to both current employees and to retirees. (*See* Cal. Code Regs., tit. 2, § 599.508 (a)(3)). CalPERS may terminate its contract to provide access to health insurance plans with any agency

[4] If the Board members are eligible for other District provided retirement plans, and the former Board members are receiving allowances under the other plan, please let us know. That fact could change our analysis.

[5] An exception to the general exclusion of Board members may apply if a Board member who currently serves on the Board was first elected to office prior to July 1, 1994. (*See* Gov. Code § 20322, subd. (c)). Please let us know if this exception applies to any of the College's current Board members.

that maintains any other health benefit plan or program in violation of Government Code section 22934. (*See* Gov. Code, § 22934, subd. (f)).

Thus, the College may not fund continued health benefits through a separate plan or program unless the College maintained other health benefit plans as specified in either the first or second exceptions above or unless it satisfies the requirements of the third exception (which is unlikely because Board members are not members of a bargaining unit). Were the College to satisfy one of the above exceptions, PEMHCA would no longer govern and Government Code section 53201 would likely dictate the limitations by which the College may fund continued health benefits under the separate plan or program.[6]

In summary, although former Board members could continue to participate in health benefits on a self-pay basis were the College to contract with a private retirement system, because the College contracts with CalPERS, PEMHCA governs. Under PEMHCA, a former Board member cannot qualify for continued health benefits even if he or she was willing to pay the full premium.

For these reasons the College should amend BP 2730 as to former Board members in order to comply with PEMHCA. The recommended amendments are discussed in subsection B below.

B. The College Should Amend Board Policy 2730 to Comply with PEMHCA.

The College should revise BP 2730 so that it adheres to the requirements set forth in PEMHCA. Suggested amendments to BP 2730 are as follows (the additions are underlined and the sections omitted are crossed out):

BP 2730 Health Benefits

Reference:

<u>Gov. Code §§ 22750, *et seq.*</u> ~~53201; 53205.~~

<u>Current Board of Trustee Members</u>

A program of health and welfare benefits including dental, vision, and life insurance with premiums paid by the College shall be provided to members of the Board of Trustees while serving in office.

[6] In the unlikely scenario that Government Code section 53201 would govern, the members must satisfy the conditions of retirement required by Section 53201 and not be merely "former" elected officials. Given that Board members are excluded from CalPERS membership, it appears unlikely that they could qualify for paid District retiree medical benefits.

<u>Retired and Former Board of Trustee Members</u>[7]

<u>Former Board of Trustee members are not eligible to participate in College health insurance programs, even on a self-pay basis, unless they retire from Board service and qualify as an annuitant under Government Code section 22760, subdivision (c), by</u>

~~In accordance with Government Code Section 53205, the above benefits shall be continued for each member of the Board of Trustees, including one dependent on record at time of termination of service~~:

(1) <u>Having an effective retirement date within 120 days of separation from Board service; and,</u> ~~Board member who took office prior to December 31, 1995, and who has a minimum of five years of Board service. The Board member and dependent must have been participants in an approved College plan at the time of termination.~~

(2) <u>Receiving a retirement allowance from a retirement system provided by the College.</u> ~~Board members taking office after January 1, 1996, shall have College-paid health and welfare benefits continued for the member only; must render a minimum of ten years of service to the college prior to termination of service from the College and must be a participant in an approved College medical plan at the time of termination.~~

V. <u>CONCLUSION</u>

As stated above, it is our opinion that:

(1) While participating in CalPERS' medical plans, the College cannot offer non-CalPERS alternative plans except in very limited circumstances. For this reason, Government Code section 53200, *et seq.*, is largely irrelevant and the limitations of PEMHCA govern;

(2) Former Board members cannot qualify as annuitants under PEMHCA, and therefore, cannot participate in the College's medical plans, even on a self-pay basis; and

[7] We are assuming that the College will continue to contract with CalPERS to provide its retirement system. Were the College to elect to contract with a different system, the language of BP 2730 should be modified in accordance with the requirements set forth in Government Code section 53201. If the College changes to non-CalPERS insurance, the policy will need to be amended. The revisions leave open the possibility that a Board member in the future, given a unique set of circumstances, may qualify as an annuitant through prior participation in STRS or CalPERS. In those unlikely circumstances, CalPERS will be granted deference to determine whether the Board member qualifies as an annuitant.

(3) Board Policy 2730 should be amended to comply with PEMHCA.

If you have any questions about this letter or any other issues, please feel free to call me.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Alysha Stein-Manes
Steven M. Berliner

SMB:asm

cc: Pilar Morin (*via email only*)