

OFFICIAL OPINION NO. 78-24

Article III, State Police Arbitration Award of March 24, 1978—Article III, § 26 of the Pennsylvania Constitution—Article III, § 29 of the Pennsylvania Constitution—40 P.S. § 535—43 P.S. § 217.1, et seq.—71 P.S. § 249(a)—72 P.S. § 7301, et seq.

1. The continuation of medical benefits for surviving dependents of State Policemen killed in the line of duty does not constitute the payment of "extra compensation" in violation of Article III, § 26 of the Pennsylvania Constitution.
2. The continuation of medical benefits for surviving dependents of State Policemen killed in the line of duty does not constitute an appropriation for "charitable, educational or benevolent purposes" in violation of Article III, § 29 of the Pennsylvania Constitution.
3. Article III of the State Police Arbitration Award of March 24, 1978, need not be submitted to the Legislature for implementation.
4. Payments made pursuant to Article III of the Arbitration Award are not "compensation" under the Tax Reform Code of 1971 and as such are not taxable.

November 30, 1978

The Honorable James N. Wade
 Secretary of Administration
 425 Main Capitol Building
 Harrisburg, PA 17120

Dear Secretary Wade:

You have requested our advice as to whether Article III of the State Police Arbitration Award dated March 24, 1978, effective July 1, 1978, 8 Pa. B. 1952, is constitutional.

It is our opinion, and you are so advised, that you should treat this award as valid and implement its provisions.

The award provides as follows:

In the event a State Police member is killed in line of duty, all medical benefits shall inure to the eligible dependents of the deceased member for a period of two years, or until the remarriage of the spouse, whichever is earlier.

You have questioned whether this arbitration award is constitutional given the provisions of Article III, §§ 26 and 29 of the Pennsylvania Constitution. In reviewing the issue of constitutionality, we are constrained by the law and precedent to recognize the presumption of the constitutionality and to resolve any doubt on the side of constitutionality. *Comm. ex rel. Schnader v. Liveright*, 308 Pa. 35, 161 A. 697 (1932); *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975). Only in a case where we can say clearly that a statute is unconstitutional will we do so. *See Hetherington v. McHale*, 10 Pa. Commonwealth Ct. 501, 512, 311 A.2d 162, 167 (1973), *reversed* 458 Pa. 479, 329 A.2d 250 (1974). While the case at hand does not directly involve a statute, nevertheless the arbitration award is rendered pursuant to a direct legislative mandate providing for binding arbitration for State Police-

men (Act of June 24, 1968, No. 111, *as amended*, 43 P.S. § 217.1, *et seq.*). For the reasons which follow, we are constrained to advise you that since we cannot say the award is clearly unconstitutional, we must, therefore, conclude that it is constitutional.

1. Your first question related to whether Article III, § 26 renders the arbitration award unconstitutional. The relevant portion of Article III, § 26 is as follows:

No bill shall be passed giving any extra compensation to any public officer, servant, employe, agent or contractor, after services shall have been rendered.

The crux issue is at what point is the compensation awarded or given. If we view the compensation as being awarded or given at the point where the medical benefits are actually paid out to the surviving dependents, then Section 26 is violated because no employment relationship exists at this point. Thus, payment of the benefit would be necessarily on account of services already rendered and an employment status which no longer exists.

However, we believe the better view is that compensation is not awarded at the point when it is actually paid out of the State Treasury but that the crucial time for determination under Article III, § 26 is July 1, 1978, the date the award becomes effective. It is at this point where the right of the policeman to receive the benefit, which is the knowledge that his dependents' medical expenses will be paid after his work-related death, is established. To put it another way, on July 1, 1978, a State Policeman has a vested right that requires the continuation of his medical benefits for his dependents after his work-related death. Thus, the benefit is not given after the services are rendered, but in conjunction with or preceding the completion of services upon which the benefit is based, as is the case of insurance or retirement benefits which flow to the beneficiaries of deceased employees.

2. You have also questioned whether the award is permitted under Article III, § 29 of the Pennsylvania Constitution. This section pertinently provides:

No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association:

Article III, § 29, as above set forth, states that no appropriation may be made for certain specified charitable purposes. But this provision has never been construed to prevent fringe benefits to public employees, such as retirement benefits. *See Busser v. Snyder*, 282 Pa. 440, 128 A. 80 (1925); *Retirement Board v. McGovern*, 316 Pa. 161, 174 A. 400 (1934). Such a fringe benefit is regarded as deferred compensation. *McGovern, supra*, at 168-169. Article III, § 29 would be violated if an award of a pension to one particular person were enacted by

the Legislature. *Francis v. Neville Township*, 372 Pa. 77, 92 A.2d 892 (1952). This does not occur under this award where the benefit is made available to all members of a class of employees who take risks in their jobs which exceed those taken by most public employees.

That this class of public employees is singled out for this type of benefit presents no problem since law enforcement officials have been recognized as a distinct class. *McIlvaine v. Pennsylvania State Police*, 6 Pa. Commonwealth Ct. 505, 296 A.2d 630 (1972), *aff'd*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *Iben v. Monaca Borough*, 158 Pa. Superior Ct. 46, 43 A.2d 425 (1945); Pa. Const., Art. III, § 31.

The benefit here should be distinguished from the benefit struck down in *Kurtz v. City of Pittsburgh*, 346 Pa. 362, 31 A.2d 257 (1943), where there was a partial payment of salary to the dependents of public employees who entered the armed forces. The Court held that this pay was unrelated to services rendered by the employees. But the Court did recognize the validity of employee benefits such as "sick leave" as a constitutional use of state funds. In *Loomis v. Board of Education of School District of Philadelphia*, 376 Pa. 428, 103 A.2d 769 (1954), the Court upheld the constitutionality of military leaves of absence of public employees and limited *Kurtz* to a holding that "the public received no benefit from the payments proposed. . . and they were therefore gratuities constitutionally prohibited." 376 Pa. at 434-435, 103 A.2d at 772.

We conclude, as the Court did in *Loomis*, that there is a public benefit provided by the award under consideration. It encourages State Policemen to continue in their occupations, to accept the risks associated therewith, and to perform their duties properly through the knowledge that should they be killed in the line of duty, the financial condition of their dependents will be alleviated in part.

Other similar fringe benefits to public employees have been accepted with little or no challenge. *See e.g.*, Act of September 26, 1961, P.L. 1661, *as amended*, 71 P.S. § 780.1, *et seq.* (group life insurance); Administrative Code of 1929, § 222, *as amended*, 71 P.S. § 82 (annual and sick leave); Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. § 637(a) (special pay and medical benefits to law enforcement officers and firemen injured in performance of duties); Act of September 27, 1951, P.L. 1473, *as amended*, 53 P.S. § 637(b) (heart and lung diseases contracted by law enforcement officers and firemen in line of duty); Governor's Office Management Directive 505.7 (employee training). The benefit under consideration is thus a further recognition of the interest of the public to encourage public employment and does not go beyond similar benefits enumerated above which have been accepted by our laws.

3. You have also requested that we determine, if the award is constitutional, whether the Legislature must act to implement the award.

Section 7(a) of the Act of June 24, 1968, No. 111, 43 P.S. § 217.7(a), provides that the determination of the arbitrator "shall constitute a mandate. . . to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body. . . of the Commonwealth with respect to matters which require legislative action. . ." The above would not specifically mandate legislative action unless an "appropriate officer" of the Commonwealth could not implement the award by administrative action.

In our opinion, the legislative action is not required to implement this award.

The Commonwealth of Pennsylvania, or any department or division thereof, . . (is) hereby specifically authorized to make contracts of insurance. . .insuring its elected or appointed officers and employes or any class or classes thereof, or their dependents, under a policy or policies of group insurance covering life, health, hospitalization, . . .Section 1 of the Act of June 22, 1931, P.L. 844, *as amended*, (40 P.S. § 535)

The foregoing clearly contemplates administrative and not necessarily legislative permission to enter into health insurance contracts for employees and their dependents (including surviving dependents). Thus, the "appropriate officer" as required by the statute is satisfied so as to negate the need for specific legislative implementation.

Additionally, it is to be noted that it has been longstanding administrative practice to consider Blue Cross and Blue Shield benefits as "salaries and wages" as set forth in 71 P.S. § 249(a) and thus the responsibility of the Executive Board to establish and maintain such benefits.

Finally, legislative action in the form of a specific appropriation is unnecessary to implement the language of Article III. By its language, the award does not confer a new benefit on the class of persons consisting of eligible dependents of State Police members who are killed in the line of duty. It merely continues existing medical benefits to this class for a period of two years following the member's death. Because Article III only involves an extension of the period of coverage of existing benefits, a legislative appropriation is not required.

4. You have also requested advice as to the taxability of payments made both for state and federal purposes.

The imposition of the state income tax is authorized by The Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. § 7301, *et seq.* This act assesses an income tax on all "compensation" received by an individual. Compensation in 72 P.S. § 7301(d)(vi) is defined as not including "payments made by employers. . .for programs covering hospitalization, sickness, disability or death. . ."

The above does not differentiate between the payments made to

benefit only the employee and those benefitting spouse or other dependents of the employee, merely that such payment be made by "employer." Therefore, it would seem clear that the Legislature intended to exclude from taxation all payments made to fund fringe benefits of employees, and just as we find that there is an employment relationship as would satisfy Article III, § 26 of the Pennsylvania Constitution, we must likewise find one that satisfies 72 P.S. § 7301(d)(vi). Even if such payments are not within the contemplation of the exclusion, the benefits would not be included in the definition of compensation as set forth in § 7301. "Compensation" is defined in 72 P.S. § 7301(d) as including "salaries, wages, commissions, bonuses and incentive payments whether based on profits or otherwise, fees, tips and similar remuneration received for services rendered. . . ." Clearly, the better reasoned construction of the foregoing definition is that medical benefits could not be considered as salaries or wages as the statute requires for taxability. Thus, the conclusion no matter how you interpret the exclusionary language in § 7301(d)(vi) is that the benefits paid are not in any event taxable.

With regard to your questions relating to the Federal taxability and reporting requirements of payments to the surviving dependents, we have determined that no opinion should be expressed at this time on these questions. We are most reluctant to give an opinion on a subject where such opinion is not binding. This determination must be made by the Internal Revenue Service, since it involves construction of a Federal statute. Appropriate personnel of the IRS have indicated that they will issue a ruling on this subject upon submission of a formal request. Steps have been taken to obtain a formal ruling from the IRS and we shall advise you upon receipt thereof.¹

Very truly yours,

LANCE H. LILIEN
Deputy Attorney General

GERALD GORNISH
Attorney General

1. Pursuant to Section 512 of the Administrative Code (71 P.S. § 192) this Opinion was submitted to the Auditor General and State Treasurer for their views as the Opinion authorizes the expenditure of money. Both the Auditor General and State Treasurer concur in the conclusion that the Arbitration Award is constitutional under Article III, §§ 26 and 29. The Auditor General and State Treasurer disagree with the opinion expressed herein on the question of implementation, suggesting that implementing legislation is necessary. The Auditor General and State Treasurer express no opinion on the question of taxability of the benefits paid.