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**Hand Delivery**

December 3, 2009

Honorable Pam Byrnes  
Chair  
House Committee on Public Employee Health  
Care Reform  
Room 251, Capitol Building  
Lansing, MI 48933

Honorable Members of the House Committee  
on Public Employee Health Care Reform  
Room 251, Capitol Building  
Lansing, MI 48933

**Re: House Bill 5345 of 2009 and Michigan Constitution 1963, Article XI, Sec. 5.**

Dear Chair Byrnes and Members of the Committee:

We have been asked for our opinion regarding the constitutionality of House Bill 5345 and its establishment of a single health care pool for the administration of current and future health care benefits for state classified employees and retirees. Based upon our review of House Bill 5345, it is our opinion that the Bill as drafted, does not contravene Art. XI, Sec. 5 of Michigan's Constitution as it relates to the state classified service.<sup>1</sup> While the enacted law may face legal challenge, as discussed below, we believe that HB 5345 should withstand constitutional scrutiny.

**I. Presumption of Constitutionality**

A statute is presumed to be constitutional unless it plainly violates the Constitution. *Council No. 11 v Civil Service Commission*, 408 Mich 385, 396; 292 NW2d 442 (1980). The Court held:

This Court will not declare a statute unconstitutional unless it is plain that it violates some provisions of the Constitution and the constitutionality of the act will be supported by all possible presumptions not clearly inconsistent with the language and the subject matter.

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<sup>1</sup> Broad language may be used throughout this opinion, but the opinion should be construed as only related to the state classified service.

*Id.* (Quoting *Oakland County Taxpayers' League v Oakland County Supervisors*, 355 Mich 305, 323; 94 NW2d 875 (1959)). See also *Civil Service Commission v Dep't of Labor*, 424 Mich 571, 603; 384 NW2d 728 (1986) (“If there is any invalidity in [the Act], it must appear so clearly as to leave no room for any reasonable doubt that it violates the Constitution, for every reasonable presumption and intendment must be resolved in favor of the constitutionality of the act.”) (internal quotations omitted).

There is no clear and binding precedent prohibiting the means or ends to which HB 5345 is committed regarding state classified employees. In fact, existing case law suggests that HB 5345 does not violate Art. XI, Sec. 5 and other sections of the Constitution support the Legislature’s power to regulate classified state employees’ benefits.

The Constitution provides the Legislature authority to “enact laws relative to the hours and conditions of employment.” Const. 1963, Art. IV, Sec. 49. The Constitution continues by providing that “[t]he public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.” Const. 1963, Art. IV, Sec. 51. Because of this broad authority, HB 5345 will be presumed to be constitutional.

## **II. Civil Service Commission’s Authority under Const. 1963, Art. XI, Sec. 5**

The Civil Service Commission’s (“Commission”) power is plenary when exercised within the scope of its authority. See *Council No. 11, supra*; *Civil Service Commission, supra*; OAG, 1991, No 6677 (March 20, 1997); OAG, 1982, No 6045 (March 1, 1982); *Michigan Association of Governmental Employees v Michigan Civil Service Commission*, 125 Mich App 180; 336 NW2d 463 (1983); *Viculin v Department of Civil Service*, 386 Mich 375; 192 NW2d 449 (1971). The scope of the Commission’s authority is provided by Art. XI, Sec. 5 of the 1963 Constitution. In relevant part, the Constitution provides:

The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

Const. 1963, Art. XI, Sec. 5, ¶ 4.

Fixing rates of compensation includes health care benefits. OAG, 1958-1959, No 3413, p 208 (October 12, 1959). The Legislature is generally prohibited from increasing or lowering levels of compensation for classified employees, except as permitted by Const. 1963, Art. XI, Sec. 5. *Michigan Association of Governmental Employees*, 125 Mich App at 189. “The Legislature was not given the power to propose or authorize increases in wages; that power belongs to the commission under art. 11, § 5, paragraph 4.” *Id.*

### **III. Substance of House Bill 5345**

HB 5345 requires the creation of a Michigan Health Benefits Program (“Program”) and requires that all public employees and all public employee retirees receive health benefits through the new Program. The definition of public employee includes those in the classified civil service. The Program itself requires the Office of the State Employer to, among other things:

Develop an array of health benefit plan options with different levels of health care coverage and health benefits adapted to the interests of various classes of employees. The plans and plan options shall comply with applicable federal standards and may include a variety of structures and benefits, including but not limited to, offering benefits through preferred provider organizations, health maintenance organization, high-deductible plan options combined with health savings accounts, self-insurance, and plan options that are tailored to address groupings of geographic needs or categories of employee risk or need.

Section 11(c).

All public employers that offer health benefits must offer them through the Program, unless they meet the exception provisions of Section 17. Under Section 17, if an existing contract is in force<sup>2</sup> or a public employer can show that it meets the opt-out requirements of Section 19, a public employer is exempted.

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<sup>2</sup> The contract exception, in Section 17, lasts only as long as the contract does.

The opt-out exception of Section 19 permits a public employer to show, based upon standards set by the Michigan Health Benefit Program Board, that the public employer can provide comparable benefits for at least 5% less than the Program. The minimum factors that must be considered under the standards are: “total premium, weighted averages for multiple plan options, and out-of-pocket expenses, and additional costs such as administrative fees in making the comparison of benefits and costs and shall make the comparison over a minimum of 3 years.” Section 19.

The Program will include myriad options, including program design differences, coverage level differentiation, and essentially any other option that the Office of the State Employer designs. If a public employer remains unsatisfied, the employer is permitted to show that it can procure the same level of coverage for less cost.

#### **IV. HB 5345 Does Not Unconstitutionally Conflict With the Commission’s Authority Under Const. 1963, Art. XI, Sec. 5, ¶ 4**

The Commission’s authority is plenary (see discussion above), but it is not unlimited. See *Council No. 11, supra*. The Court in *Council No. 11*, found that the Commission’s “power does not extend . . . to the blanket prohibition of off-duty activities, political or otherwise, as a matter of public policy simply because such activities may conceivably interfere with satisfactory job performance.” *Council No. 11*, 408 Mich at 407. Therefore, the Court found that the political freedom act (MCL 15.401 *et seq.*), which permits political activities on a classified employee’s off-duty time, did not violate the Commission’s plenary power to “regulate all conditions of employment in the classified service.” Const. 1963, Art. XI, Sec. 5, ¶ 4. Further, the Legislature is also **not** precluded from “eliminating a position once it is classified as within the civil service system.” *Civil Service Commission*, 434 Mich at 625.

The Legislature may also take action that has only an ancillary effect on classified employees. OAG, 1991, No. 6677, (March 20, 1991). In this Opinion, the Attorney General was asked whether statewide licensure requirements for professional counselors also applied to unlicensed classified employees. The Attorney General concluded that such requirements did apply to classified employees, just as licensure requirements for doctors and lawyers apply to classified employees, because the “Legislature likewise has its own constitutional sphere of authority.” *Id.* That sphere of authority, as it relates to HB 5345, includes legislating for the health and welfare of Michigan citizens. Const. 1963, Art. IV, Sec. 51. “This is true even if the

legislation has the ancillary effect of requiring” (OAG, No 6677) that benefits be procured through a particular process.<sup>3</sup>

Therefore, the constitutionality of HB 5345 involves a two-part inquiry: (1) pursuant to the analysis and logic of *Council No. 11*, a legislative enactment does not violate the Commission’s plenary power if the enactment legislates an area outside of the Commission’s plenary power; and (2) a legislative enactment, created under the Legislature’s constitutional authority, does not impermissibly encroach on the Commission’s authority if the enactment is pointed to a broader policy goal and impacts a broader class than the classified civil service. See OAG, No 6677; OAG, 2006, No 7187 (February 16, 2006).<sup>4</sup>

A. HB 5345 does not legislate within the Commission’s Constitutional Authority.

There is some question whether HB 5345 legislates within the realm of Commission plenary authority. The Commission is empowered to fix levels of compensation. Const. 1963, Art. XI, Sec. 5, ¶ 4. And health benefits are a form of compensation. OAG, No 3413. Outside of the Legislature’s limited veto power (which is inapplicable here), the Legislature has no authority over classified employees’ compensation. *Michigan Association of Governmental Employees*, at 189.

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<sup>3</sup> It is also instructive to consider The Management and Budget Act (MCL 18.1101 *et seq.*), which requires the Department of Management and Budget (“DMB”) to “issue directives for the procurement, receipt, inspection, and storage of supplies, materials, and equipment . . . .” MCL 18.1261(6). This requirement exists despite procurement and supply of tools and equipment existing as a bargained-for issue in at least one labor contract. See Michigan State Employees Association’s 2008-2010 Contract, Art. 35. Another relevant example in the **same** Article of the **same** contract is a reference to parking, which is a form of compensation. *Id.* MCL 18.1227 permits DMB to “establish and collect fees for parking on state operated parking facilities from state employees, state officials, and from the general public.” The contract recognizes state employee parking is subject to state law.

<sup>4</sup> Const. 1963, Art. IV, Sec. 48 “prohibits legislative enactment of any law regarding the resolution of employment disputes among those in the state classified civil service[.]” thereby limiting the Legislature’s constitutional authority to “enact laws providing for the resolution of disputes concerning public employees.” Const. 1963, Art. IV, Sec. 48; *Department of Social Services v Kulling*, 190 Mich App 360, 362; 475 NW2d 464 (1991). “The Civil Service Commission possesses plenary power and may determine the procedures by which a state-classified civil service employee may obtain review of his or her grievance.” *Id.* at 363-364. This constitutional limitation on legislative authority is not implicated by HB 5345.

HB 5345, however, only requires that a risk pool be developed, while permitting the Office of the State Employer to develop essentially as many options for coverage as the Program's constituents require. See HB 5345, Section 11(c). There is no reason to assume that the Commission's options for "compensation" would not remain the same or even improve, thereby not impacting or not infringing on the Commission's authority to "fix" compensation.<sup>5</sup> By not legislating in the Commission's sphere of influence, HB 5345 does not violate Const. 1963, Art. XI, Sec. 5.

- B. HB 5345's creation of a broadly applicable health care pool, which applies to classified employees, as it does to all other public employees, does not violate Const. 1963, Art. XI, Sec. 5.

Even assuming that a court would find that HB 5345 legislates in an area of Commission authority, it must still be determined whether it legislates **impermissibly** in an area of Commission authority. Based upon the general applicability of the Program, a court should find such legislation to be permissible.

The Attorney General opined, in Opinion No 7187, that the Michigan Campaign Finance Act's prohibitions against public bodies using public resources to make political contributions was not an unconstitutional attempt at legislating within the Commission's sphere. OAG, No 7187. Such a campaign finance prohibition broadly applies to all public bodies and broadly limits the use of "public resources." *Id.* The Attorney General found that since: (1) statutes are presumed constitutional, (2) "the Legislature has broad powers to protect the public interest," and (3) because the prohibition in question was consistent with the purpose behind the civil service system, the application of the legislation (to classified employees) was constitutional. *Id.*<sup>6</sup>

In Opinion No 6677, *supra*, the Attorney General found a legislatively enacted professional licensure requirement applicable to classified employees, despite the Commission's power to regulate conditions of employment in the classified service. OAG, No 6677. In doing so, the Attorney General contrasted the situation with that evident in OAG, 1988, No 6517 (May 25, 1988), where the Legislature had attempted to legislate the particular educational

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<sup>5</sup> In other words, the Commission continues to set the compensation, just not the vendor.

<sup>6</sup> Issues relating to OAG, No. 7187 and the Commissions' authority over use of public resources for political purposes is currently pending in the Ingham County Circuit Court in *Cox v Michigan Civil Service Commission* (Case No. 08-101-CZ).

requirements for a timber harvest program involving classified employees. In OAG, No 6517, the Attorney General said that “[w]hile the Legislature may provide for the licensure or registration of the various professions or occupations, it may not, consonant with Const 1963, art 11, Sec. 5, p4, classify positions in the classified civil service.”

The same logic holds here with HB 5345. The Legislature can provide for (pursuant to its broad legislative authority) insurance plans, programs, and risk pools that cover significantly more than the classified service. If the Legislature were to attempt to legislate the classified service’s specific level of compensation, however, such attempt would be clearly unconstitutional. As it is, HB 5345 requires all public employers to provide health benefits<sup>7</sup> through the Program, but does not limit or prescribe what those benefits will be, how much employees will have to pay for it, or other negotiable issues, which are within the Commission’s authority.

Finally, as noted above, HB 5345 provides an opt-out provision, which may allow the Commission to except its benefits from the Program and, therefore, avoid any effect on the classified civil service.

C. HB 5345 violates neither the State Police Troopers’ and Sergeants’ Constitutional collective bargaining rights, nor their rights to binding arbitration.

Const. 1963, Art. XI, Sec. 5, ¶ 5, provides State Police Troopers and Sergeants the right to collective bargaining and the right to binding arbitration. Troopers and Sergeants may bargain collectively concerning “conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions . . . .” Const. 1963, Art. XI, Sec. 5, ¶ 5. This paragraph provides specific procedural protection to Troopers and Sergeants but provides no additional authority to the Commission than otherwise exists in paragraph 4 (discussed above). Therefore, there is no reason to believe that this paragraph limits the Legislature’s authority to create a single health care risk pool as contemplated by HB 5345, anymore than paragraph 4.

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<sup>7</sup> Nothing in HB 5345 requires a public employer to provide benefits if the employer does not already, nor does the bill require that levels of coverage be increased or decreased.

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## V. Conclusion

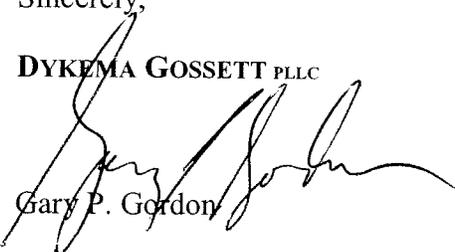
The Commission's power, within the scope of its constitutionally granted authority, is plenary. Despite the Commission's broad power with regard to state classified employees, HB 5345 should be found to be constitutional for two reasons: (1) it legislates outside the Commission's scope of authority; and (2) even if HB 5345 is found to legislate within the Commission's scope, the bill is so broadly drawn as to only have an ancillary effect on the classified civil service.

Accordingly, and based upon the authorities and rationale set forth above, it is our opinion that current case law does not prohibit, and Michigan's Constitution does not forbid, the lofty policy goals inherent in HB 5345 as currently written and as applied to state classified employees. Therefore, if HB 5345 were enacted as currently drafted, and if the issue were presented to a court of competent jurisdiction, the court should uphold the constitutionality of the act.

This opinion is limited to the issue of whether HB 5345 unconstitutionally intrudes into the Commission's plenary power in Const. 1963, Art. XI, Sec. 5, ¶¶ 4-5 as it relates to classified state employees. This is an expression of our professional opinion and not the guarantee of any result.

Sincerely,

**DYKEMA GOSSETT PLLC**

  
Gary P. Gordon

cc: Hon. Andrew Dillon, Speaker of the House  
Room 166, Capitol Building, Lansing, MI

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December 2, 2009

Honorable Pam Byrnes  
House Standing Committee on Public Health Care Reform

Re: H.B. 5345 of 2009

Dear Hon. Byrnes and members of the Committee:

We understand that members of this Committee and others coming before it have questioned whether the Michigan Constitution prevents the Michigan Legislature from establishing a single health care insurance program to administer existing and future health care benefits for all public sector employees and retirees. Based on our review of H.B. 5345 and the Constitutional provisions at issue, except those arising under Article XI, we are of the opinion that H.B. 5345 as drafted does not contravene the Constitution. While H.B. 5345 may face future legal challenges, as discussed below, the provisions of H.B. 5345 should be upheld as constitutional if challenged.

First, Michigan law is well-established that legislation is presumed to be constitutional when the Legislature is acting within the sphere of its authority. *Council No. 11 v. Civil Service Commission*, 408 Mich. 385, 398; 292 N.W.2d 442 (1980). According to the Supreme Court:

This Court will not declare a statute unconstitutional unless it is plain that it violates some provisions of the Constitution and the constitutionality of the act will be supported by all possible presumptions not clearly inconsistent with the language and the subject matter.

*Council No. 11*, 408 Mich. at 398; *Civil Service Commission v. Dep't of Labor*, 424 Mich. 571; 384 N.W.2d 728 (1986). Article IV, Sec. 49 of the Constitution provides that "The Legislature may enact laws relative to the hours and conditions of employment." Section 51 of Article IV further states that "The public health and welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health." As such, H.B. 5345 is presumed to be a constitutional exercise of the Legislature's authority under Sections 49 and 51 of Article IV.

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Second, there is no clear and binding precedent prohibiting the ends to which H.B. 5345 seeks to achieve. Rather, existing case law suggests that H.B. 5345 does not violate Articles I, VII, or IX. These areas of concern are addressed below:

**Article IX:**

The leading case in the area of health care benefit modifications for public employees is *Studier v. Michigan Public School Employees' Retirement Board*, 472 Mich. 642; 698 NW2d 350 (2005), in which the Michigan Supreme Court determined that health care benefits are not "accrued financial benefits" under Article IX, Section 24. In *Studier*, public school retirees sought to prevent MPSERS from increasing their prescription drug co-payments and deductibles. In addition to holding that health benefits are not protected under Article IX, Section 24, the Supreme Court also found that the state statute creating health care benefits for public school retirees did not establish a contract which could not be impaired under Article I, Section 10. See also *Tyler v. Livonia Public Schools*, 220 Mich.App. 697; 561 NW2d 390 (1997)(noting that government benefits payable pursuant to statute are not contractual in nature, but suggesting that accrued benefits could not be changed). *Studier* suggests, therefore, the Legislature may enact legislation which modifies or changes health care benefits for retired public sector employees without violating either the pension-guarantee or the impairment-of-contract provisions of the Constitution. In short, retiree health care benefits, either the level of benefit or administration of those benefits, which are provided pursuant to statute may be modified by the Legislature under *Studier*.

Applying the *Studier* Court's reasoning by analogy to current public employees receiving health care benefits pursuant to statute, the modification and consolidation of the administration of health care benefits for current public employees without a collective bargaining agreement similarly would not violate Article IX, Section 24. See e.g., OAG 1982-83, No. 6045 (March 1, 1982)(noting that Article 11 was not intended to divest the Legislature from creating or directing the State Employees' Retirement System). Employee representatives have argued vigorously that *Studier* should not extend to current employees with collective bargaining agreements in place, and challenges heard by the current Supreme Court could result in a limitation of or modification to *Studier*'s reasoning.

**Article I:**

Even assuming, however, that *Studier* is limited to the retirees and/or public employees without collective bargaining agreements, the Legislature should still be able to overcome the constitutional prohibition in Article I, Sec. 10. As recognized by the Supreme Court, the intent of the impairment provision "is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements." *Studier*, 472 Mich. at

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474. This protection, however, is not absolute. “The prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people.” *Health Care Assoc. Workers Compensation Fund v. Bureau of Worker’s Compensation*, 265 Mich.App. 236; 694 NW2d 761 (2005)(quoting *Studier*). As explained by the Court of Appeals:

A three-pronged test is used to analyze Contract Clause issues. The first prong considers whether the state law has operated as a *substantial* impairment of a contractual relationship. The second prong requires that *legislative disruption of contractual expectancies be necessary to the public good*. The third prong requires that the means chosen by the legislature to address the public need be *reasonable*. In other words, if the impairment of a contract is only minimal, there is no unconstitutional impairment of contact. However, if the impairment is severe, then to be upheld it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means adopted to implement the legislation are reasonably related to the public purposed. *Id.* at 241 (emphasis added; internal quotes and citations omitted).

In *Health Care Association Workers Compensation Fund*, a self-insurers group challenged the constitutionality of a statutory amendment which prevented the self insurers from conditioning payment of dividends on the employer’s continued participation with the group. Applying the three-pronged analysis to the facts of the case, the Court of Appeals found the statute served a legitimate and significant public purpose by providing lower costs to employers and increasing competition. The Court of Appeals specifically noted that it “is customary in reviewing economic and social regulation ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.” *Id.* at 242; *cf.*, *Washtenaw Community College Education Assoc. v. Bd. of Trustees of Washtenaw Community College*, 50 Mich.App. 467; 213 NW2d 567 (1973)(statute prohibiting community colleges from contributing to any retirement fund other than the public school employees retirement fund unconstitutionally impaired the collective bargaining agreement because there was no showing of risk of financial ruin to the public school employees retirement fund).

In this case, Michigan courts will be constrained to give weight to the Legislature’s judgment that the modification and consolidation of the public sector health care system is profoundly in the public interest because of the significant cost reduction associated with the consolidation. The public purpose argument is strengthened further by the current economic climate and budget constraints faced by every level of the public sector. As with any case, however, there is a risk that ultimately the Michigan Supreme Court could determine that

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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consolidation and unification of public sector employee health benefits does not serve a public interest sufficient to overcome Article I, Section 10.

**Article VIII:**

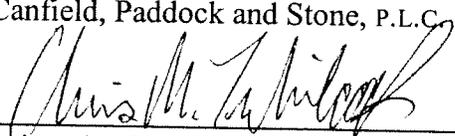
Under Article IV, Sections 49 and 51, the Legislature has the constitutional authority to enact laws affecting conditions of employment, and to protect and promote the health and general welfare of the State. As such, H.B. 5345 does not run afoul of Article VIII Sections 5 and 6 to the extent that H.B. 5345 complements, as opposed to contravening, the powers stated in Article VIII. *See e.g.*, OAG, 1992-93, No. 6723 (June 23, 1992)(finding that the prevailing wage act does not conflict with Article VIII because the legislature may enact laws relative to the hours and conditions of employment); *Western Michigan Univ. Bd. of Control v. State*, 455 Mich. 531; 5656 N.W.2d 828 (1997)(recognizing that the legislature can validly exercise its police power for the welfare of the state and a constitutionally protected university can be affected by the law).

In sum, current case law does not prohibit the Legislature, within limits, to modify and consolidate Michigan's administration of public sector health care benefits.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By: \_\_\_\_\_

  
Christopher M. Trebilcock

CMT/mrb

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