THEODORE L. KESSNER
WILLIAM D. KUESTER
STEVEN G. SEGLIN
ROCKY C. WEBER
RICK G. WADE
DAVID A. JARECKE
MARY J HEWITT
WILLIAM R. KUTILEK

CROSBY GUENZEL
ATTORNEYS AT LAW

134 SO. 13TH STREET, SUITE 400
LINCOLN, NEBRASKA 68508
TELEPHONE: (402) 434-7300
FACSIMILE: (402) 434-7303
E-MAIL: info@crosbylawfirm.com

ROBERT C. GUENZEL (RETIRED)

ROBERT B. CROSBY (1911-2000)
THOMAS R. PANSING (1917-1973)
DONN E. DAVIS (1929-1998)

WRITER'S DIRECT DIAL NO:
(402) 434-7324

WRITER'S E-MAIL ADDRESS:
sgs@crosbylawfirm.com

April 27, 2000

Rex Carpenter
General Manager
Nebraska Rural Electric Association
P.O. Box 82048
Lincoln, NE 68501

Re: Director Compensation / Medical Insurance

Dear Rex:

With the passage of LB 901, effective July 13, 2000, *Neb. Rev. Stat.* § 70-624.03 is amended to authorize a public power district to pay a director's health insurance premiums in addition to the amount of compensation authorized to be paid to such director pursuant to *Neb. Rev. Stat.* § 70-624.02. The amount of compensation authorized to be paid under § 70-624.02 has been increased from an amount not to exceed $4800 for each director (except the president) to an amount not to exceed $6720 per year. The compensation for the president has increased from an amount not to exceed $5400 to an amount not to exceed $7560 a year. Prior to the amendment, if a district elected to provide health insurance for its directors under § 70-624.03, the premiums for such insurance, together with cash compensation, could not exceed the maximum amount set forth in § 70-624.02. Now, under LB 901, a director may receive compensation not to exceed $6720 (not to exceed $7560 for the president) and, in addition, may have his or her health insurance premiums paid by the district.

The change in the law has prompted the question of whether a director who has not previously participated in a power district's health insurance plan, is now required to participate before the district may pay a director's health insurance premiums. The answer to this question is yes.

The language of § 70-624.03, which provides that "the board of directors may establish a plan of insurance," possibly may be used to argue that a power district could establish a separate or different plan of insurance for directors. Hypothetically, this separate or different plan may include a cash payment to the directors for the payment of health insurance premiums. However, there are several reasons that counsel against establishing a separate or different plan for directors. First, there is a general prohibition against discrimination among employees of the

same plan (a director is an employee for purposes of health insurance). Second, there are possible income tax consequences to a director if a cash payment was made to a director in lieu of paying for health insurance premiums. Third, the payment of cash for health insurance may exceed the statutory maximum compensation.

This conclusion is consistent with several opinions given by Pat Healey on this and related topics. On June 15, 1993, Mr. Healey gave an opinion after LB 182 was passed. LB 182 amended § 70-624.03 to specifically grant a public power district the option to pay a director's health insurance premium as part of a director's compensation, so long as the statutory maximum for all types of compensation was not exceeded. In that opinion, Mr. Healey stated that "[p]ower districts which have previously changed their policies to provide a set salary with the directors to pay their own insurance may wish to consider changing back, in late September or October, to a policy which has the district pay for the medical insurance with the amount thereof counted against the compensation limit." In other words, if a director elects to have the district pay his or her health insurance premium, the director should participate in the district's health insurance plan.

In addition, Mr. Healey has provided opinions on the treatment of director's medical fringe benefits in regard to income tax matters and Social Security. In a January 14, 1998 opinion, Mr. Healey stated "[t]hus it appears that for purposes of income tax matters as well as Social Security, a director of a political subdivision such as a public power district should be treated as an employee for purposes of withholding [as well as] employee medical and other fringe benefits." Consistent with this rationale, a director may be considered to be an "employee" for federal income tax purposes as a result of participating in medical and other fringe benefits, including the district's health insurance plan.

In summary, it is my opinion that in order for a public power district to pay health insurance premiums on behalf its directors, such directors must participate in the power district's employee health insurance plan, just like any other employee of the district. In addition, any payment for premiums must be made directly to the heath insurance provider, the same as for any other employee of the district. Section 70-624.03 states in part "[m]embers of the board of directors of the district may be considered employees for purposes of this section." If a power district decides to pay health insurance premiums for its directors, it is advisable to do so on the same basis as it pays health insurance premiums for its regular employees.

Generally, a regular employee has no right to request a cash payment in lieu of the health insurance premiums that the power district would otherwise pay on behalf of such employee, unless a district has a Cafeteria Plan. If the power district has a Cafeteria Plan that allows an employee to elect a cash payment in lieu of a payment of health insurance premiums, such cash payment is included in the employee's gross income as compensation. See Pat Healy opinion on Cafeteria Plan-Income Tax, dated April 1, 1998.

An interesting question arises if a district maintains a Cafeteria Plan. If the Cafeteria Plan allows an employee to elect to take cash in lieu of health insurance premiums, can a director make the same election? I do not believe that a director could elect this option, even if a regular employee can, for the following reasons. First, there is a lack of specific state statutory authority allowing the inclusion of a director in a Cafeteria Plan. Generally, a political subdivision only

has the authority specifically granted by the legislature. A good example of this is the specific statutory amendment in LB 182 which granted to power districts the option to include directors in a district's health insurance plan. This conclusion is not inconsistent with Mr.Healy's opinion on Cafeteria Plans that stated in effect that a director may be deemed an employee as to his or her participation in a Cafeteria Plan for federal income tax purposes. The same opinion however acknowledges that the federal tax law does not control the treatment of a director as an employee for state law purposes.

In addition, LB 901 specifically sets the maximum amount of compensation that may be paid to a district director. Although a director may be paid the maximum amount allowed under the new law and participate in the district's health insurance plan, a director cannot be paid the maximum amount and take cash in lieu of health insurance under a Cafeteria Plan. The additional cash compensation may, if a district is paying the maximum amount of compensation, violate the strict statutory constraints of LB 901 (LB 901 expressly states that "[n]o director shall receive any other compensation from the district, except as provided in this section...").

What if a district is not paying the maximum compensation allowed by law to its directors? Would the answer be different? No, because there is no specific statutory authority that allows a director to participate in a Cafeteria Plan or receive cash in lieu of health insurance premiums.

Finally, if a power district elects to provide heath insurance to its directors under LB 901, the benefit cannot take effect until the next time a newly elected director begins a term of office, which is January of 2001.

Sincerely,

FOR THE FIRM

SGS:rrk

Steven G. Seglin