May 27, 1999

OPINION NO. 99-033

The Honorable R. Larry Schneider
Union County Prosecuting Attorney
223 West Sixth Street
P.O. Box 231
Marysville, Ohio 43040-0231

Dear Prosecutor Schneider:

We have received your request for an opinion regarding the compensation of various elected officials. Your questions are as follows:

1. May a county official receive an in-term increase in compensation as a result of an increase in county population?

2. Which population index or indexes may be used to establish the population of a county for purposes of determining the compensation of county officials?

We understand that your questions concern the statutory scheme in R.C. Chapter 325 for the compensation of certain elected officers. Pursuant to this scheme, the base figure of each officer's compensation is determined by a statutory "classification and compensation schedule," each of which establishes fourteen classifications, defined by specific population ranges.[1] Each officer's compensation classification is determined by the population range that is applicable to the county the officer serves. Within each classification and compensation schedule, the greater the population, the greater the compensation. Thus, should a county's population increase or decrease sufficiently to place the county in a different population range, the officer's

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[1] *See, e.g.*, R.C. 325.03 (county auditor); R.C. 325.04 (county treasurer); R.C. 325.06 (county sheriff); R.C. 325.08 (clerk of court of common pleas); R.C. 325.09 (county recorder); R.C. 325.10 (county commissioners), R.C. 325.11(A) (prosecuting attorney); R.C. 325.14(A) (county engineer); R.C. 325.15 (county coroner).

compensation classification will also change, resulting in a corresponding increase or decrease in the officer's base salary.[2] *See generally* 1991 Op. Att'y Gen. No. 91-057 at 2-281 to 2-282.

Your first question asks whether an officer whose compensation is prescribed by one of the classification and compensation schedules contained in R.C. Chapter 325 is entitled to an increase in compensation during the officer's term if the population of the county increases during such term. This question arises out of certain prohibitions that Ohio law places on in-term changes in the compensation of public officers.

The first such prohibition is contained in Ohio Const. art. II, § 20, which provides that the General Assembly "shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." It is well settled that Ohio Const. art. II, § 20 applies to elected county officers. *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976). Let us, therefore, examine the nature of the prohibition established by art. II, § 20.

As explained in *Schultz v. Garrett*, 6 Ohio St. 3d 132, 135, 451 N.E.2d 794, 798 (1983), "[s]ection 20, Article II of the Constitution forbids the granting of in-term salary increases to officers when such changes are the result of direct legislative action on the section(s) of the Revised Code which are the basis of the officers' salaries." As further explained by the *Schultz* court, however, Ohio Const. art. II, § 20 does not prohibit all in-term changes in the compensation of public officers. Rather, "[w]here a statute setting forth the formula for the compensation of an officer is effective before the commencement of such officer's term, any salary increase which results from a change in one of the factors used by the statute to calculate the compensation is payable to the officer. Such increase is not in conflict with Section 20, Article II of the Constitution when paid to the officer while in term." *Schultz v. Garrett*

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[2] The total salary of certain of the officers about whom you ask may also be affected by additional statutory factors. *See, e.g.*, R.C. 325.06(B) and (C) (sheriff); R.C. 325.11(B) and R.C. 325.111 (prosecuting attorney); R.C. 325.14(B) (county engineer); R.C. 325.15(B) and (C) (county coroner); R.C. 325.18 (increases in compensation for county treasurer, clerk of the court of common pleas, county recorder, and county commissioner). An additional provision concerning only the offices of county treasurer, clerk of the court of common pleas, county recorder, and county commissioner is contained in R.C. 325.18(E), which states:

> Notwithstanding this section and [R.C. 325.06, R.C. 325.11, R.C. 325.14, and R.C. 325.15], when computing a salary for any elected county officer under any of such sections, if the population range for the class under which the officer is to be compensated is not the same as the population range for that class for any other such elected office, the class at which that officer's salary is determined shall be the highest class at which any officer from that county is compensated under the population ranges applicable to that officer.

(syllabus) (overruling, *State ex rel. Edgecomb v. Rosen*, 29 Ohio St. 2d 114, 279 N.E.2d 870 (1972)).

In determining whether Ohio Const. art. II, § 20 prohibits the officers about whom you ask from receiving an increase in compensation based upon an increase in the population of the county the officer serves, we begin by noting that each officer's classification and compensation schedule in R.C. Chapter 325, *see generally* note one, *supra*, uses population as one of the factors in determining the officer's compensation. According to the rule set forth in *Schultz v. Garrett*, however, so long as the statutory formula for compensating the officer was in effect prior to the commencement of that officer's term, Ohio Const. art. II, § 20 does not prohibit the officer from receiving the compensation assigned to the higher classification.[3] *See State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 283, 39 N.E.2d 840, 845-46 (1942) ("the weight of authority is that a statute effective before the beginning of the term of a public officer whereby his compensation is automatically increased or diminished during his term by reason of increase or decrease of the population or of the valuation of the taxable property as shown by a later census or tax duplicate, is not in conflict with a constitutional inhibition to the effect that the compensation of such officer shall not be increased or decreased during his term of office"); 1991 Op. Att'y Gen. No. 91-057; 1982 Op. Att'y Gen. No. 82-047.

In addition to the prohibition against in-term changes in compensation established by Ohio Const. art. II, § 20, it is also necessary to consider R.C. 325.22, which states:

> Notwithstanding anything to the contrary in this chapter, the compensation payable to a county auditor, county treasurer, county sheriff, clerk of the court of common pleas, county recorder, county commissioner, prosecuting attorney, county engineer, or county coroner *shall not be reduced during the remainder of his term of office on account of a decline in the population of the county*. (Emphasis added.)

R.C. 325.22 thus prohibits certain reductions in the compensation of the officers named therein that would otherwise be permissible under Ohio Const. art. II, § 20. *See* 1982 Op. Att'y Gen. No. 82-047 at 2-135; *accord* 1991 Op. Att'y Gen. No. 91-057 at 2-282 and 2-283. By its terms, R.C. 325.22 prohibits only reductions in compensation based upon a decline in population. Neither R.C. 325.22 nor any other statute, however, prohibits an officer compensated under one of the classification and compensation schedules set forth in R.C. Chapter 325 from receiving a

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[3] The terms of the current elected county officers began in either 1997 or 1999, depending on the office involved. The most recent change to a statutory compensation schedule was made in 1996, prior to the commencement of those terms. *See, e.g.*, 1995-1996 Ohio Laws, Part VI, 11560, 11590 (Am. Sub. S.B. 310, eff., in part, Sept. 19, 1996) (R.C. 325.06); 1995-1996 Ohio Laws, Part III, 4589 (Am. Sub. H.B. 408, eff., in part, Feb. 7, 1996, and, in part, May 8, 1996) (R.C. 325.06, R.C. 325.11, R.C. 325.12, R.C. 325.14, R.C. 325.15, and R.C. 325.18).

population-related in-term increase in compensation as prescribed by such schedule, so long as the statutory schedule was in place prior to the commencement of the officer's term.

Accordingly, in response to your first question, a county auditor, county treasurer, county sheriff, common pleas court clerk, county recorder, county commissioner, prosecuting attorney, county engineer, or county coroner is entitled to receive an in-term increase in compensation as a result of a population increase that places the county in a higher classification in the applicable classification and compensation schedule prescribed by R.C. 325.03, R.C. 325.04, R.C. 325.06, R.C. 325.08, R.C. 325.09, R.C. 325.10, R.C. 325.11, R.C. 325.14, or R.C. 325.15, provided that the pertinent statutory schedule was in effect prior to the commencement of that officer's term. Such an in-term increase in compensation does not violate the provisions of either Ohio Const. art. II, § 20 or R.C. 325.22.

Your second question asks which index or indexes of population may be used to establish county population for purposes of applying the classification and compensation schedules of R.C. Chapter 325. In particular, you wish to know whether it is permissible to use a more current index than the last decennial federal census, which was taken in 1990. You believe the ability to base compensation on a more recent index would be advantageous to officers in those counties that have been experiencing rapid population growth.

The term "population" is not specifically defined within the classification and compensation schedules of R.C. Chapter 325 or any related provisions. As generally defined for purposes of the entire Revised Code, "'[p]opulation' means that shown by the most recent regular federal census." R.C. 1.59(D). Thus, pursuant to R.C. 1.59(D), county population for purposes of the classification and compensation schedules of R.C. Chapter 325 is the population established by the most recent regular federal census. *See* 1982 Op. Att'y Gen. No. 82-047 at 2-134; *accord* 1992 Op. Att'y Gen. No. 92-035 at 2-134, 1991 Op. Att'y Gen. No. 91-057 at 2-282.

Although the above-cited opinions each found the decennial federal census to constitute a regular federal census for purposes of the definition of "population" set forth in R.C. 1.59(D), none of them were required to consider whether the decennial federal census was the only applicable standard. Thus, none of these opinions are determinative of the question you have presented. In order to answer your question, it is, therefore, necessary to consider the meaning of the phrase "regular federal census," as used in R.C. 1.59(D).

The exact phrase "regular federal census" has not to our knowledge been interpreted by any Ohio court.[4] Insight into the meaning of that term may be gleaned from *State ex rel.*

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[4] A census taken by a state or local government or by a private entity does not satisfy a requirement in Ohio law for use of a federal census. *See Murray v. State ex rel. Nestor*, 91 Ohio St. 220, 110 N.E.2d 858 (1915) (holding that when a statute required that population be

Brubaker v. Brown, 163 Ohio St. 241, 126 N.E.2d 439 (1955), in which the Ohio Supreme court considered whether population information compiled by the Bureau of Census under its authority to make "special statistical compilations and surveys" at the request of state and local officials is within the meaning of the words "any federal census," as used in R.C. 703.01 and 703.06.[5] Relying upon the use of the words "enumeration" of "persons," as used in U.S. Const. art. I, § 2, cl. 3, as the apparent origin of what is commonly referred to as a "census," the *Brubaker* court concluded that the word "census," as used in R.C. 703.01 and R.C. 703.06, means an "enumeration" of "persons."[6] 163 Ohio St. at 246, 126 N.E.2d at 442. Finally, the *Brubaker* court concluded that, "[s]ince this 'census' was taken by the federal government pursuant to federal laws authorizing its taking, it was obviously a 'federal census.'" *Id*.

Further inquiry is necessary, however, to discern the intention of the General Assembly in qualifying the term "federal census" with the word "regular" within the definition of "population" set forth in R.C. 1.59(D). The Ohio Supreme Court has interpreted the term "regular" in a similar context as meaning "as the law requires to be held at a stated time and place." *See State ex rel. Cline v. Trustees*, 20 Ohio St. 288, 293 (1870) (defining a "regular meeting" of a board of township trustees). *See generally Black's Law Dictionary* 1285 (6th ed. 1990) (defining "regular" as meaning, in part, "conformable to law. Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation"). Applying the *Cline* court's definition of "regular" to the term "federal census," we conclude that a "regular federal census" is an enumeration of inhabitants that the federal government is required by law to make at a stated time.

Currently, federal law authorizes the Secretary of the Department of Commerce, acting through the Bureau of the Census, to compile four types of population information. First, "[t]he Secretary shall … take a decennial *census* of population as of the first day in April" in every tenth year ending in zero. 13 U.S.C.A. § 141(a) (West 1990) (emphasis added). Second, "[t]he Secretary … shall take a mid-decade *census* of population," as of the first day of April in every tenth year ending in five. 13 U.S.C.A. § 141(d) (West 1990) (emphasis added). Third, "[t]he Secretary may conduct *special censuses*" for state, county, or other local governments upon

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determined by the "last federal census," a more current census taken by a municipality could not be used instead).

[5] R.C. 703.01 and 703.06 concern the classification of municipalities as cities or villages based upon population as shown in "any federal census."

[6] *See Dep't. of Commerce v. U.S. House of Representatives*, 119 S. Ct. 765, 781 (1999) (Scalia, J., concurring) (concerning the meaning of the term "actual Enumeration," as used in U.S. Const. art. I, § 2, cl. 3, stating, "[d]ictionaries roughly contemporaneous with the ratification of the Constitution demonstrate that an 'enumeration' requires an actual counting, and not just an estimation of number").

request and prepayment of costs. 13 U.S.C.A. § 196 (West 1990) (emphasis added). Fourth, in the intervals between each "census" of population required by 13 U.S.C.A. § 141, and to the extent feasible, the Secretary "shall … produce and publish … *current data* on total population" for specified units of government on an annual or biannual basis. 13 U.S.C.A. § 181(a) (West 1990) (emphasis added).

It is our understanding that the "current data" compiled in accordance with 13 U.S.C.A. § 181(a), unlike the other three categories of federal population information, consists only of population estimates, and that it is this data to which your questions refer. In considering whether the data published under 13 U.S.C.A. § 181(a) constitutes a "regular federal census," as used in R.C. 1.59(D), for purposes of the classification and compensation schedules prescribed by R.C. Chapter 325, we must begin with the *Brubaker* court's description of a "census" of a locality as an "enumeration of persons" in that locality. 163 Ohio St. at 245, 126 N.E.2d at 442. As generally understood, the term "enumeration" denotes ascertaining the number of something by counting, *Webster's Third New International Dictionary* 759 (unabridged ed. 1993), while "estimate" means a "rough or approximate calculation," *id*. at 779. *See* note six, *supra*. *See generally* R.C. 1.42 (stating, in part, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). Accordingly, because the estimates published by the Bureau of Census pursuant to 13 U.S.C.A. § 181(a) as "current data" are merely rough or approximate calculations, they do not qualify as "censuses" as that term is understood for purposes of Ohio law.

Although we have concluded that the "current data" published under 13 U.S.C.A. § 181(a) referred to in your request does not constitute a "regular federal census" for purposes of R.C. Chapter 325, you also question whether any other population index might constitute a "regular federal census." Of the remaining types of population information authorized by federal law, only the decennial and mid-decade censuses are required by law; special censuses are discretionary. *See* 13 U.S.C.A. §§ 141(a), (d) (providing that the Secretary "shall" take the decennial and mid-decade censuses); 13 U.S.C.A. § 196 (providing that the Secretary "may" take special censuses). *See generally United States ex rel. Siegel v. Thomas*, 156 U.S. 353, 359 (1895) (when used in juxtaposition, the word "shall" indicates a mandatory provision and the word "may" indicates a permissive provision); *accord Dorrian v. Scioto Conservancy Dist*., 27 Ohio St. 2d 102, 271 N.E.2d 911 (1971) (syllabus, paragraph one). Thus, only the decennial and mid-decade censuses qualify as "regular" federal censuses for purposes of Ohio law. Despite the mandatory language of 13 U.S.C.A. § 141(d), however, we are informed by personnel at the Bureau of the Census that Congress has never funded a mid-decade census and that no mid-decade census has ever been taken. Accordingly, as a practical matter, the only "regular federal census" available is the decennial federal census.

In response to your second question, we thus conclude that, pursuant to R.C. 1.59(D), the most recent regular federal census must be used to establish the population of a county for purposes of determining the compensation of the officers compensated in accord with the classification and compensation schedules of R.C. Chapter 325. At the current time, the only regular federal census is the decennial federal census taken pursuant to 13 U.S.C.A. § 141(a).

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. A county auditor, county treasurer, county sheriff, common pleas court clerk, county recorder, county commissioner, prosecuting attorney, county engineer, or county coroner is entitled to receive an in-term increase in compensation as a result of a population increase that places the county in a higher classification in the applicable classification and compensation schedule prescribed by R.C. 325.03, R.C. 325.04, R.C. 325.06, R.C. 325.08, R.C. 325.09, R.C. 325.10, R.C. 325.11, R.C. 325.14, or R.C. 325.15, provided that the pertinent statutory schedule was in effect prior to the commencement of that officer's term. Such an in-term increase in compensation does not violate the provisions of either Ohio Const. art. II, § 20 or R.C. 325.22.

2. Pursuant to R.C. 1.59(D), the most recent regular federal census must be used to establish the population of a county for purposes of determining the compensation of an officer in accord with the classification and compensation schedules of R.C. Chapter 325. At the current time, the only regular federal census is the decennial federal census, which is required by the provisions of 13 U.S.C.A. § 141(a) (West 1990).

Respectfully,

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Attorney General

May 27, 1999

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SYLLABUS: 99-033

1. A county auditor, county treasurer, county sheriff, common pleas court clerk, county recorder, county commissioner, prosecuting attorney, county engineer, or county coroner is entitled to receive an in-term increase in compensation as a result of a population increase that places the county in a higher classification in the applicable classification and compensation schedule prescribed by R.C. 325.03, R.C. 325.04, R.C. 325.06, R.C. 325.08, R.C. 325.09, R.C. 325.10, R.C. 325.11, R.C. 325.14, or R.C. 325.15, provided that the pertinent statutory schedule was in effect prior to the commencement of that officer's term. Such an in-term increase in compensation does not violate the provisions of either Ohio Const. art. II, § 20 or R.C. 325.22.

2. Pursuant to R.C. 1.59(D), the most recent regular federal census must be used to establish the population of a county for purposes of determining the compensation of an officer in accord with the classification and compensation schedules of R.C. Chapter 325. At the current time, the only regular federal census is the decennial federal census, which is required by the provisions of 13 U.S.C.A. § 141(a) (West 1990).