May 12, 1997

OPINION NO. 97-027

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
2900 Columbus Avenue
Sandusky, Ohio 44870-2636

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

Dear Prosecutors Baxter and Mayberry:

You have submitted opinion requests in which you ask whether a member of a board of elections is entitled to receive the pay increase set forth in R.C. 3501.12, as amended in Am. Sub. H.B. 408, 121st Gen. A. (1996) (eff., in pertinent part, May 8, 1996), during the term of office the member was serving when Am. Sub. H.B. 408 became effective. Prosecutor Baxter, you also ask whether Am. Sub. H.B. 408 authorizes a board of elections member to receive health benefits under R.C. 3501.141(B) where such benefits are to begin mid-term.

In order to understand the questions you present, it is first necessary to set forth the following background information. Pursuant to Ohio Const. art. II, ' 20, the General Assembly is required to fix the term and compensation of all officers, "but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." In *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (syllabus, paragraph one), the Ohio Supreme Court concluded that a public officer, for purposes of art. II, ' 20, is "one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise functions either of an executive, legislative or judicial character." Upon examination of the various duties imposed by statute upon members of boards of elections "who are appointed by the Secretary of State for a definite term and who take an oath of office," the *Pethtel* court found such members to exercise a portion of the sovereignty of the state and, therefore, to be "officers whose compensation is subject to the provision of Section 20 of Article II of the state Constitution, which precludes a change of compensation of any officer during his existing term." 153 Ohio St. 1, 90 N.E.2d 686 (syllabus, paragraph three).[1]

Since the decision in *Pethtel*, the General Assembly has, on a number of occasions, amended R.C. 3501.12, which prescribes the salary of board of elections members. Most significantly, in 1984 the General Assembly amended R.C. 3501.12 to increase the annual salary of board members and added to that section the following language: "For the purposes of this section, members of boards of elections shall be deemed to be appointed and not elected, and therefore not subject to section 20 of article II of the Ohio Constitution." 1983-1984 Ohio Laws, Part II, 4937, 4959 (Am. Sub. H.B. 897, eff. Dec. 26, 1984).[2] Most recently, the General Assembly amended R.C. 3501.12 in Am. Sub. H.B. 408, discussed above, again increasing the annual salary of board of elections members and retaining the language added to that section by Am. Sub. H.B. 897.[3]

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[1] Pursuant to R.C. 3501.06, there is a board of elections in each county, consisting of four members, who are appointed by the Secretary of State and who serve for a term of four years. Two members of each board are appointed on the first day of March in even-numbered years. Thus, each board of elections member's term lasts for four years, beginning on the first day of March in an even-numbered year. The terms of the board members are staggered so that two of the four members' terms end in each even-numbered year.

[2] With respect to this amendment of R.C. 3501.12, the court's decision in *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950), that board of elections members are "officers" who are subject to the prohibition in Ohio Const. art. II, ' 20 against in-term changes in compensation, was based upon the nature of the duties performed by the board members, *i.e.*, their performance of a portion of the sovereignty of the state, not the manner in which they are selected for office. Moreover, in *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29 (1916), the court concluded in syllabus, paragraph three, that "[t]he term 3officers,3 as used in Section 20, Article II of the Constitution, includes both appointive and elective officers."

[3] Prior to its amendment in Am. Sub. H.B. 408, 121st Gen. A. (1996) (eff., in pertinent part, May 8, 1996), R.C. 3501.12 prescribed the annual compensation of board of elections members within a certain range, based exclusively upon the population of the county. 1983-1984 Ohio Laws, Part II, 4937, 4958 (Am. Sub. H.B. 897, eff. Dec. 26, 1984). Am. Sub. H.B. 408 amended R.C.

Thus, although the Ohio Supreme Court has expressly declared that board of elections members are officers who are subject to the prohibition of Ohio Const. art. II, ' 20 against in-term changes in compensation, the General Assembly has sought, through amendment of R.C. 3501.12, to alter the status of board of elections members as officers for purposes of art. II, ' 20. It appears, therefore, that you question the effect of the language added to R.C. 3501.12 by Am. Sub. H.B. 897, and whether such language makes board of elections members eligible, in the middle of their terms of office, for the pay increases authorized by the amendment of R.C. 3501.12 in Am. Sub.H.B. 408, which took effect on May 8, 1996.

Before examining this question, we must advise you that the Attorney General is without authority to determine the constitutionality of acts of the General Assembly. As summarized in 1988 Op. Att'y Gen. No. 88-030 at 2-124 through 2-125:

> As part of the executive branch of government, the Attorney General is not empowered to determine the constitutionality of state statutes. Rather, that is the function exclusively of the judiciary. *Maloney v. Rhodes*, 45 Ohio St. 2d 319, 324, 345 N.E.2d 407, 411 (1976) ("[a]n attack upon the constitutional validity of a law must be made in a proper court. The judicial power to declare a law unconstitutional is exclusively within the judicial branch of government"); *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 169, 114 N.E. 55, 59 (1916), *aff'd*, 241 U.S. 565 (1916) ("[t]he power of determining whether a law or constitutional provision is valid or otherwise is lodged solely in the judicial department"); 1986 Op. Att'y Gen. No. 86-010.

3501.12 to increase each board member's compensation by a certain percentage of the previous year's salary, beginning in calendar year 1997.

Thus, until a court determines the constitutionality of R.C. 3501.12, it must be presumed to be constitutional. *See generally State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 587, 651 N.E.2d 995, 999 (1995) ("[s]tatutes are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision"); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955) (syllabus, paragraph one) ("[a]n enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible"). Ultimately, therefore, whether the above-quoted language added to R.C. 3501.12 by Am. Sub. H.B. 897 altered the Ohio Supreme Court's conclusion that board of elections members are subject to the prohibition of Ohio Const. art. II, ' 20 is a matter that must be determined by the judiciary. Within the scope of an opinion, this office is, therefore, obliged to presume the constitutionality of R.C. 3501.12, and must advise you to follow the mandates of R.C. 3501.12, as most recently amended in Am. Sub. H.B. 408. At the same time, however, we must also caution you of the potential constitutional conflicts that exist within the statute. *See generally City of Rocky River v. State Employment Relations Bd.*, 43 Ohio St. 3d 1, 6, 539 N.E.2d 103, 108 (1989) ("it is generally beyond the power of the legislature to change or 3correct3 judicial interpretation of the Constitution.... The doctrine of judicial supremacy in constitutional interpretation is widely and generally conceded"); *State ex rel. Shkurti v. Withrow*, 32 Ohio St. 3d 424, 429, 513 N.E.2d 1332, 1337 (1987) ("[t]he interpretation of the Ohio Constitution is ... not a legislative but a judicial question, which ultimately this court must decide"); note two, *supra*.

Turning now to examination of the compensation of board of election members established by Am. Sub. H.B. 408, it is necessary to examine the language of R.C. 3501.12, which states in pertinent part:

> (A) Except as provided in division (B) of this section, the amount of annual compensation of members of the board [of elections] shall be as follows:
> (1) Seventy-five dollars for each full one thousand of the first one hundred thousand population;
> (2) Thirty-six dollars for each full one thousand of the second one hundred thousand population;
> (3) Twenty dollars for each full one thousand of the third one hundred thousand population;
> (4) Six dollars for each full one thousand above three hundred thousand population.
> (B) The compensation of a member of the board shall not be less than three thousand dollars and shall not exceed fifteen thousand dollars annually.
> (C) In calendar year 1997, the annual compensation of each member of the board shall be computed after increasing the amounts specified in divisions (A) and (B) of this section by three per cent.
> (D) In calendar year 1998, the annual compensation of each member of the board shall be computed after increasing by three per cent the amounts used to compute the compensation of a member under division (C) of this section.

R.C. 3501.12(E) and (F) provide similar increases in compensation for calendar years 1999 and 2000. For purposes of your questions, therefore, the significant changes to R.C. 3501.12 are the additions of divisions (C) through (F).

The amendments to R.C. 3501.12 became effective on May 8, 1996. Because board of elections members' terms commence on March 1 of even-numbered years, R.C. 3501.06, all board members were mid-term when the amendments to R.C. 3501.12 became effective. The last paragraph of R.C. 3501.12, however, states: "For the purposes of this section, members of boards of elections shall be deemed to be appointed and not elected, and therefore not subject to Section 20 of Article II of the Ohio Constitution." While the meaning of the first portion of this sentence is unclear, the last portion of the sentence evinces a clear legislative intent that board members not be subject to the prohibition of Ohio Const. art. II, ' 20 against in-term changes in compensation. Again, while it is not clear that an act of the General Assembly is sufficient to overturn an interpretation of a provision of the Ohio constitution by the Ohio Supreme Court, *see generally City of Rocky River v. State Employment Relations Bd.*, this office is unable to make that determination, and until a court decides otherwise, must advise you that board of elections members are entitled to receive in the years 1997 through 2000, the annual compensation prescribed by R.C. 3501.12, as amended by Am. Sub. H.B. 408.

The second question asked by the Erie County Prosecuting Attorney is whether a board of elections member is entitled to receive health benefits under R.C. 3501.141 where such benefits are to commence mid-term. This question was specifically addressed in 1990 Op. Att'y Gen. No. 90-108, which concluded in syllabus, paragraph two, that "[a] board of elections may not, after a board member's term has begun, authorize the procurement of insurance for that member under R.C. 3501.141(B) to commence during his term of office." For the reasons that follow, I must concur with this conclusion.

The basis for this conclusion was set forth as follows:

> The extent of the board's authority to provide insurance coverage for its members pursuant to R.C. 3501.141(B)[4] is limited by the language stating that the board may procure such insurance "when each member's term begins." In light of this express limitation contained in the language of R.C. 3501.141(B), I must conclude that a board of elections is without authority to obtain insurance for any board member under the authority of this subdivision of the statute at any time other than at the beginning of such member's term. (Footnote added.)

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[4] R.C. 3501.141(B) states:

> The board of elections of any county may procure and pay all or any part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for the members appointed to the board of elections under [R.C. 3501.06] and their

Op. No. 90-108 at 2-479. R.C. 3501.141 has not been amended since the issuance of Op. No. 90-108. Thus, based upon the language of R.C. 3501.141(B), setting forth the board of elections' authority to purchase insurance coverage for board members, I concur with the conclusion reached in Op. No. 90-108, syllabus, paragraph two.

I feel it is necessary to mention that Op. No. 90-108 supported its reading of R.C. 3501.141(B) by noting that such a reading of R.C. 3501.141(B) was consistent with the board of elections members' status as "officers," as decided by the *Pethtel* court, who are subject to the prohibition of Ohio Const. art. II, ' 20 against in-term changes in compensation. While, as discussed above, there may be some question as to whether board of elections members are, for certain purposes, "officers" subject to Ohio Const. art. II, ' 20, the language of R.C. 3501.12 which raises that question limits its effect by declaring board members not to be subject to art. II, ' 20 only "[f]or the purposes of this section." Moreover, the express language of R.C. 3501.141(B) limits the authority of a board of elections to provide insurance coverage for its members only "when each member's term begins." While this conclusion may appear to be inconsistent with the advice given in response to your first question, both conclusions are compelled by the language of the controlling statutes. In answer to your second question, I conclude, therefore, that a board of elections may not, after a board member's term has begun, procure insurance for that member under R.C. 3501.141(B) to commence during the member's term of office.

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

1. In the absence of a judicial determination as to the constitutionality of R.C. 3501.12, board of elections members are entitled to receive in the years 1997 through 2000, the annual compensation prescribed by R.C. 3501.12, as amended by Am. Sub. H.B. 408, 121st Gen. A. (1996) (eff., in pertinent part, May 8, 1996), regardless of when their terms of office commenced.

2. A board of elections may not, after a board member's term has begun, procure insurance for that member under R.C. 3501.141(B) to commence during the member's term of office. (1990 Op. Att'y Gen. No. 90-108, syllabus, paragraph two, approved and followed.)

Respectfully,

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immediate dependents *when each member's term begins*, whether issued by an insurance company or a health or medical care corporation, duly authorized to do business in this state. (Emphasis added.)

BETTY D. MONTGOMERY
Attorney General

May 12, 1997

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SYLLABUS: 97-027

1. In the absence of a judicial determination as to the constitutionality of R.C. 3501.12, board of elections members are entitled to receive in the years 1997 through 2000, the annual compensation prescribed by R.C. 3501.12, as amended by Am. Sub. H.B. 408, 121st Gen. A. (1996) (eff., in pertinent part, May 8, 1996), regardless of when their terms of office commenced.

2. A board of elections may not, after a board member's term has begun, procure insurance for that member under R.C. 3501.141(B) to commence during the member's term of office. (1990 Op. Att'y Gen. No. 90-108, syllabus, paragraph two, approved and followed.)