January 8, 1997

OPINION NO. 97-005

The Honorable Charles E. Coulson
Lake County Prosecuting Attorney
Courthouse
P.O. Box 490
Painesville, Ohio 44077

Dear Prosecutor Coulson:

You have requested an opinion regarding the eligibility of members of a board of health of a general health district to be paid in accordance with certain amendments to R.C. 3709.02. Your question is prompted by the prohibition in Ohio Const. art. II, §20 against in-term changes in the compensation of public officers and the conclusions in 1979 Op. Att'y Gen. No. 79-102 regarding the application of that prohibition to members of a board of health of a general health district. In the light of that prohibition and its interpretation in Op. No. 79-102, you wish to know whether members of a board of health of a general health district who held their positions on the effective date of those amendments may be paid in the manner specified by those amendments.

R.C. 3709.02 provides for the appointment and payment of members of a board of health of a general health district. *See* R.C. 3709.02(A)-(C).[1] In Am. Sub. H.B. 117, 121st Gen. A. (1995) (eff., in part, Sept. 29, 1995), the General Assembly amended R.C. 3709.02 for the purpose, *inter alia*, of modifying the formula for calculating the amount to be paid each member of a board of health for the member's attendance at meetings of the board. Am. Sub. H.B. 117 also modified the

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[1] R.C. 3709.03 grants a general health district advisory council the authority to appoint the members of the board of health of a general health district. *See generally* 1995 Op. Att'y Gen. No. 95-030. However, R.C. 3709.03 also provides that if the district advisory council fails to meet or appoint a member of the board of health as required thereunder or by R.C. 3709.02, the Director of Health, with the consent of the Public Health Council, "may appoint the member." *See* Am. Sub. H.B. 355, 121st Gen. A. (1996) (eff. April 2, 1996). *See also* R.C. 3709.04 (if in any general health district the district advisory council fails to meet or to select a board of health, the Director of Health may, with the consent of the Public Health Council, "appoint a board of health for such district which shall have and exercise all powers conferred on a board of health of a general health district").

criteria for calculating the amounts to be received by a member of a board of health for expenses incurred by the member for travel to and from meetings of the board and certain conferences.

In this instance you have asked about the eligibility of members of a board of health of a general health district to be paid in accordance with the amendments to R.C. 3709.02 as set forth in Am. Sub. H.B. 117. Specifically, your question concerns members of a board of health serving in their positions on September 29, 1995, which is the date upon which those amendments became effective.

Let us first review the matters addressed in Op. No. 79-102. Section 20 of article II of the Ohio Constitution prohibits in-term changes in the compensation of public officers in the following manner: "The general assembly, in cases not provided for in this constitution, 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." In Op. No. 79-102 the Attorney General was asked whether members of a board of health of a general health district are public officers for purposes of the foregoing constitutional prohibition. The question was prompted by legislation enacted by the General Assembly for the purpose of amending R.C. 3709.02 to read, in pertinent part, as follows:

> Each member of the board shall be paid twenty dollars a day and mileage at the rate of fifteen cents a mile to and from the place of meeting to cover the actual and necessary expenses incurred during his attendance at any meeting of the board and not exceeding five meetings of board committees in any one year.

See 1977-1978 Ohio Laws, Part II, 3701 (H.B. 1009, eff. March 8, 1979). Prior to this amendment, R.C. 3709.02 had provided, in pertinent part, as follows:

> Each member of the board shall be paid six dollars a day and mileage at the rate of eight cents a mile to and from the place of meeting to cover the actual and necessary expenses incurred during his attendance upon any meeting of the board not exceeding twelve meetings in any one year.

See 1967-1968 Ohio Laws, Parts I & II, 1211, 2245 (Am. S.B. 257, eff. Nov. 24, 1967).

In response the Attorney General advised that members of a board of health of a general health district are public officers for purposes of the prohibition in Ohio Const. art. II, §20, and therefore such board members "may not receive an increase in compensation during their existing terms of office." Op. No. 79-102 (syllabus, paragraph one). In arriving at this conclusion the Attorney General determined that members of a board of health hold a public office as defined by the Ohio courts, and thus are public officers. Op. No. 79-102 at 2-314. In support of that determination the opinion relied upon the decisions of the Ohio Supreme Court in *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 381, 26 N.E.2d 190, 196 (1940), and *State ex rel. Landis v. Board of Comm'rs of Butler County*, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917). Those decisions set forth and approved the common law criteria for determining whether a particular

position is a public office rather than a position of employment.

The Attorney General then considered whether payments to a member of a board of health under R.C. 3709.02 were within the purview of Ohio Const. art. II, §20, and, if so, whether the amendments to R.C. 3709.02 in H.B. 1009 effected an increase in those payments that could not take effect during a board member's existing term of office. Op. No. 79-102 answered each of those inquiries in the affirmative.

Regarding the scope of the constitutional prohibition, Op. No. 79-102 explained that the Ohio Supreme Court has read the prohibition broadly, such that it applies to various types of payments made to and received by public officers. In that regard Op. No. 79-102 cited the decisions of the court in *State ex rel. Artmayer v. Bd. of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975), and *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976).

In *State ex rel. Artmayer v. Bd. of Trustees* the court held that the terms "salary" and "compensation," as used in Ohio Const. art. II, §20, are synonymous. In so holding the court expressly overruled its earlier decisions in *Thompson v. Phillips*, 12 Ohio St. 617 (1861), and *Gobrecht v. Cincinnati*, 51 Ohio St. 68, 36 N.E. 782 (1894), which had held to the contrary. *See also State ex rel. DeChant v. Kelser*, 133 Ohio St. 429, 14 N.E.2d 350 (1938) (rejecting the argument that the words "compensation" and "salary" as used in Ohio Const. art. II, §20 are not synonymous); *State ex rel. v. Raine*, 49 Ohio St. 580, 31 N.E. 741 (1892) (syllabus) ("[a] statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office, contravenes [Ohio Const. art. II, §20], in so far as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted"); *cf. State ex rel. Boyd v. Tracy*, 128 Ohio St. 242, 253, 190 N.E. 463, 468 (1934) (considering a similar prohibition in Ohio Const. art. II, §31 applicable to members of the General Assembly, and expressing the view that the terms "salary" and "compensation" "do not mean a thing when cases of this character are being considered, the whole question being, _Can the number of dollars payable to an incumbent of a public office be increased by the enactment of a statute during his term of office?_").

In *State ex rel. Parsons v. Ferguson* the court further determined that the term "compensation," as used in Ohio Const. art. II, §20, encompasses fringe benefits extended to a public officer, including premium payments made to secure health insurance for the public officer:

> Fringe benefits, such as the payments made here, are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check. It is obvious that an office holder is benefitted [*sic*] and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and only then transmitted to the insurance company.

46 Ohio St. 2d at 391, 348 N.E.2d at 694. Accordingly, such payments for fringe benefits "may not constitute _salary,_ in the strictest sense of that word, but they are compensation." *Id.*

Applying the statements of the Ohio Supreme Court in *State ex rel. Artmayer v. Bd. of Trustees* and *State ex rel. Parsons v. Ferguson*, Op. No. 79-102 determined that the types of

payments made to a member of a board of health under R.C. 3709.02 are subject to the strictures of Ohio Const. art. II, §20. Op. No. 79-102 further determined that the legislation in question affected those payments in a manner that was prohibited by those strictures, and thus advised that such changes could not be implemented during a board member's existing term of office.

Op. No. 79-102 is correct in its conclusion that a member of a board of health of a general health district is a public officer for purposes of Ohio Const. art. II, §20. In particular, Op. No. 79-102 accurately assessed the nature of the duties, powers, and responsibilities conferred upon the members of a board of health by the statutory provisions that appear in R.C. Chapter 3709, and appropriately drew therefrom the inference that such board members, in the course of fulfilling their statutory responsibilities, exercise continuing and independent governmental functions. *See also* 1995 Op. Att'y Gen. No. 95-030 at 2-150 (reviewing the general powers and duties conferred upon a board of health of a general health district by the provisions of R.C. Chapters 3707 and 3709). It is apparent, in other words, that the powers thus conferred upon the members of a board of health of a general health district "constitute a part of the sovereignty of the state." *State ex rel. Landis v. Board of Comm'rs of Butler County*, 95 Ohio St. at 160, 115 N.E. at 920. *See also State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (citing with approval *State ex rel. Landis v. Board of Comm'rs of Butler County*); *Scofield v. Strain*, 142 Ohio St. 290, 51 N.E.2d 1012 (1943) (same); 1985 Op. Att'y Gen. No. 85-036 at 2-127; 1971 Op. Att'y Gen. No. 71-071 at 2-242 and 2-243; 1963 Op. Att'y Gen. No. 3548, p. 58, at 61 ("[t]he requisite elements of public office are: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer"). It follows, therefore, that a member of a board of health of a general health district is a public officer for purposes of Ohio Const. art. II, §20.

We also agree with the determination in Op. No. 79-102 that payments made to a member of a board of health of a general health district pursuant to R.C. 3709.02 are subject to the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. In reaching that conclusion Op. No. 79-102 correctly interpreted and applied the statements of the Ohio Supreme Court regarding the categories of payments that are within the purview of the constitutional provision.[2] This means

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[2] In 1985 Op. Att'y Gen. No. 85-036 the Attorney General approved the conclusion thus reached in 1979 Op. Att'y Gen. No. 79-102, and reiterated at 2-127 and 2-128 that Ohio Const. art. II, §20 covers both salary and expenses paid to a public officer:

> It is by now well established that art. II, §20 prohibits a public officer from receiving, during his term, not only an increase in his fixed salary, but also an increase in the amount allowed him for the expenses he incurs in performing his official duties. In *State ex rel. v. Raine*, 49 Ohio St. 580, 31 N.E. 741 (1892), the court addressed the issue whether incumbent county commissioners could receive the benefit of a newly enacted statutory provision allowing commissioners one thousand dollars per year for expenses incurred in the discharge of their duties. The court concluded that the allowance constituted salary for purposes of Ohio Const. art. II, §20 and thus could

that changes enacted by the General Assembly that affect payments made pursuant to R.C. 3709.02, whether by way of increase or decrease, may not be implemented and applied to a member of a board of health during the member's existing term of office. *See, e.g.*, 1993 Op. Att'y Gen. No. 93-045 (syllabus, paragraph one) (where a board of county commissioners decreases the percentage of the premium paid by the county on behalf of county officers and employees for insurance coverage provided under R.C. 305.171, without any change in the amount of coverage thus provided, such a decrease constitutes a change in salary for purposes of Ohio Const. art. II, §20, and may not be applied to a county officer during the term of office the officer was serving at the time such decrease became effective); 1992 Op. Att'y Gen. No. 92-031 at 2-120 (Ohio Const. art. II, §20 "prohibits any change, whether an increase or decrease, in an officer's salary during his term"); 1945 Op. Att'y Gen. No. 387, p. 473 (when the General Assembly, pursuant to Ohio Const. art. II, §20, has fixed the compensation of any officer, whether by way of salary or fees or both, any change in such compensation effected by the enactment, amendment, or repeal of any law, shall not operate to increase or decrease the compensation of such officer during his existing term, unless the office be abolished).

The remaining task is to determine whether the amendments to R.C. 3709.02 enacted by Am. Sub. H.B. 117, 121st Gen. A. (1995) (eff., in part, Sept. 29, 1995) have affected the payments that may be made to members of a board of health of a general health district under that section. This requires a comparison of R.C. 3709.02, as amended by Am. Sub. H.B. 117 in 1995, with the version of that statute that was enacted by the General Assembly in Am. S.B. 297 in 1992. *See* 1991-1992 Ohio Laws, Part I, 1741 (Am. S.B. 297, eff. April 16, 1993).

As enacted by Am. S.B. 297, R.C. 3709.02 provided the following with regard to payments to be made to each member of a board of health of a general health district for mileage and the actual and necessary expenses incurred by the member in attending meetings of the board and its committees:

> Each member of the board may be paid a sum not to exceed eighty dollars a day and mileage to and from the place of meeting at the rate established by the director of

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not be paid to a commissioner who held his office when the provision was enacted. In *State ex rel. Boyd v. Tracy*, 128 Ohio St. 242, 190 N.E. 463 (1934), the court discussed the application of Ohio Const. art. II, §31, which prohibits members of the General Assembly from receiving in-term increases in compensation, to a statute which granted legislators a sum sufficient to pay expenses, but which was not to exceed four dollars per day for room and board. The court concluded that such reimbursement for expenses was compensation which could not be paid to incumbent legislators. *State ex rel. Harbage v. Ferguson*, 68 Ohio App. 189, 36 N.E.2d 500 (Franklin County 1941), *appeal dismissed*, 138 Ohio St. 617, 37 N.E.2d 544 (1941), although not specifically dealing with in-term increases, concluded that reimbursement for a legislator's travel expenses constitutes part of his compensation for purposes of art. II, §31.

> budget and management pursuant to section 126.31 of the Revised Code to cover the actual and necessary expenses incurred during his attendance at any meeting of the board and not exceeding five meetings of board committees in any one year.[3] (Footnote added.)

As amended by Am. Sub. H.B. 117, R.C. 3709.02 states, in pertinent part, as follows:

> (B) Each member of the board shall be paid a sum not to exceed eighty dollars a day for the member's attendance at each meeting of the board. No member shall receive compensation for attendance at more than eighteen meetings in any year.
> (C) Each member of the board shall receive travel expenses at rates established by the director of budget and management pursuant to section 126.31 of the Revised Code to cover the actual and necessary travel expenses incurred for travel to and from meetings that take place outside the county in which the member resides, except that any member may receive travel expenses for registration for any conference that takes place inside the county in which the member resides.[4] (Footnote added.)

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[3] In 1994 Op. Att'y Gen. No. 94-023 (syllabus), the Attorney General advised that R.C. 3709.02, as enacted by 1991-1992 Ohio Laws, Part I, 1741 (Am. S.B. 297, eff. April 16, 1993), entitled a member of a board of health of a general health district to be paid "for mileage travelled to and from each meeting listed in that statute at the rate established by the Director of Budget and Management in 3 Ohio Admin. Code 126-1-02(C)," and, in addition, "an amount not to exceed eighty dollars per day for those necessary expenses that the member actually incurs in attending such meeting."

[4] In section 1 of Am. Sub. H.B. 355, 121st Gen. A. (1996) (eff. April 2, 1996), the General Assembly has since amended R.C. 3709.02 to read, in pertinent part, as follows:

> Each member of the board may be paid a sum not to exceed eighty dollars a day and mileage to and from the place of meeting at the rate established by the director of budget and management pursuant to section 126.31 of the Revised Code to cover the actual and necessary expenses incurred during attendance at any meeting of the board and not exceeding five meetings of board committees in any one year.

Section 2 of Am. Sub. H.B. 355 also states that existing section 3709.02, *inter alia*, is "hereby repealed."

It is apparent that Am. Sub. H.B. 355 did not take into account the amendments to R.C. 3709.02 enacted earlier in Am. Sub. H.B. 117. In such a situation R.C. 1.52(B) provides the following rule of construction:

> If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be

Am. Sub. H.B. 117 has separated the provisions of R.C. 3709.02 into five divisions. That legislation has also made several substantive revisions with respect to the matters addressed in those divisions. Division (B) of R.C. 3709.02 provides that each member of a board of health of a general health district shall be paid a sum not to exceed eighty dollars a day for the member's attendance at each meeting of the board, and also provides that no member shall receive compensation for attendance at more than eighteen meetings in any year. Division (C) of R.C. 3709.02 provides that each member of the board shall receive travel expenses at rates established by the Director of Budget and Management pursuant to R.C. 126.31 to cover the actual and necessary travel expenses incurred for travel to and from meetings that take place outside the county in which the member resides. R.C. 3709.02(C) also provides that any member of a board of health may receive travel expenses for registration for any conference that takes place inside the county in which the member resides.

Am. Sub. H.B. 117 has thus limited the number of meetings of a board of health of a general health district for which a board member may be paid a sum not exceeding eighty dollars a day for his attendance; the limitation is eighteen meetings in any year. The prior version of R.C. 3709.02 imposed no limitation on the number of board meetings for which a member could be paid, yet limited to five per year the number of board committee meetings for which a member could be paid. In another departure from the prior law, Am. Sub. H.B. 117 has also eliminated the authorization to pay each member of a board of health a sum not exceeding eighty dollars a day for the member's attendance at no more than five board committee meetings in any one year. Moreover, Am. Sub. H.B. 117 no longer limits these payments to only those amounts that cover the actual and necessary expenses incurred during the member's attendance at board meetings. *See* note three, *supra*.

Regarding travel expenses, Am. Sub. H.B. 117 limits payment to the actual and necessary travel expenses that are incurred by a board member for travel to and from board meetings that take place *outside* the county in which the member resides, with the exception that a member may receive travel expenses for registration for any conference that takes place *inside* the county in which the member resides. Previously, R.C. 3709.02 made no mention of the location of meetings of a board of health for purposes of paying mileage reimbursement to a member who travelled to and from

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> harmonized, if possible, so that effect may be given to each. If the amendments are substantively irreconcilable, the latest in date of enactment prevails. The fact that a later amendment restates language deleted by an earlier amendment, or fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable. Amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation.

It is unclear whether the amendments to R.C. 3709.02 enacted in Am. Sub. H.B. 117 and Am. Sub. H.B. 355 are substantively irreconcilable, or whether those amendments can be harmonized and reasonably put into simultaneous operation.

those meetings, nor did the statute authorize the payment of mileage for travel expenses incurred by a member for registration for any conference held within the county in which the member resides.

Accordingly, the amendments thus enacted by the General Assembly in Am. Sub. H.B. 117 affect the payments received by a member of a board of health of a general health district under R.C. 3709.02 and constitute a change in compensation for purposes of the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. In Am. Sub. H.B 117 the General Assembly has substantially revised the statutory scheme pursuant to which members of a board of health are paid in connection with their attendance at meetings of the board.

Am. Sub. H.B. 117 has omitted from R.C. 3709.02 the requirement that a sum not exceeding eighty dollars a day is to be paid to a board member for the member's "actual and necessary expenses" incurred during the member's attendance at meetings of a board of health. This means that a board member's receipt of a sum not exceeding eighty dollars a day during the member's attendance at meetings of the board no longer must correspond to a specific amount of expenses actually and necessarily incurred by the member during that attendance.[5] The likely effect of this change, therefore, is to increase the amount that a member of a board of health may receive for the member's attendance at meetings of the board.

Assume, for example, that a board member actually incurred forty dollars in necessary expenses during his attendance at a meeting of the board of health. Under the prior version of R.C. 3709.02, this member would be entitled to be paid no more than forty dollars because that is the amount of expenses he actually and necessarily incurred during his attendance at the board meeting. Under the current version of R.C. 3709.02, however, this same board member is eligible to receive a sum not exceeding eighty dollars for the member's attendance at the board meeting, notwithstanding that the board member actually incurred only forty dollars in necessary expenses. This represents an increase in the amount for which the board member is eligible to be paid under R.C. 3709.02(B).

Conversely, R.C. 3709.02(B) now limits to eighteen per year the number of meetings of a board of health for which a member shall be paid for his attendance. Insofar as the prior version of R.C. 3709.02 imposed no limitation upon the number of board meetings for which a member could be paid in any year, this new limitation could decrease the aggregate amount of payments received by a member of a board of health for the member's attendance at meetings of the board. Similarly, the elimination of the authorization to pay a member of a board of health for the member's attendance at no more than five board committee meetings in any one year could result in a decrease in the aggregate amount of payments made to a board member.

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[5] In other words, under R.C. 3709.02(B), the amounts paid to a member of a board of health for attending meetings of the board more nearly approximate compensation for services rendered rather than reimbursement for expenses incurred, and indeed the statute expressly designates these amounts as "compensation."

Finally, Am. Sub. H.B. 117 limits payment of a board member's travel expenses to only those meetings of a board of health that occur outside the county in which the member resides. In addition, Am. Sub. H.B. 117 now authorizes payment of a board member's travel expenses for registration for any conference that takes place inside the county in which the member resides.[6] The prior version of R.C. 3709.02 provided no such authorization. It would appear that in most circumstances, the effect of these changes will be to decrease the aggregate amount of payments made to a member of a board of health for the member's travel expenses.

The amendments to R.C. 3709.02 enacted by the General Assembly in Am. Sub. H.B. 117, therefore, affect the payments received by members of a board of health of a general health district under that section and constitute a change in compensation for purposes of the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. Therefore, a person serving as a member of a board of health of a general health district on the effective date of those amendments may not be paid in the manner specified by those amendments.

It is, therefore, my opinion, and you are advised that:

1. A person who serves as a member of a board of health of a general health district is a public officer for purposes of the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. (1979 Op. Att'y Gen. No. 79-102, approved and followed.)

2. Payments made to a member of a board of health of a general health district pursuant to R.C. 3709.02 are within the purview of the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. (1979 Op. Att'y Gen. No. 79-102, approved and followed.)

3. The amendments to R.C. 3709.02 enacted by the General Assembly in Am. Sub. H.B. 117, 121st Gen. A. (1995) (eff., in part, Sept. 29, 1995) affect the payments received by members of a board of health of a general health district under that section and constitute a change in compensation for purposes of the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. Therefore, a person serving as a member of a board of health of a general health district on the effective date of those amendments may not be paid in the manner specified by those amendments.

Respectfully,

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[6] R.C. 3709.02(C) states that each member of a board of health of a general health district "may receive travel expenses for *registration* for any conference that takes place inside the county in which the member resides." (Emphasis added.) The statute makes no mention, however, of a member's travel expenses for *attendance* at any such conference. In that respect, therefore, the statute is ambiguous.

BETTY D. MONTGOMERY
Attorney General

January 8, 1997

The Honorable Charles E. Coulson
Lake County Prosecuting Attorney
Courthouse
P.O. Box 490
Painesville, Ohio 44077

SYLLABUS: 97-005

1.A person who serves as a member of a board of health of a general health district is a public officer for purposes of the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. (1979 Op. Att'y Gen. No. 79-102, approved and followed.)

2.Payments made to a member of a board of health of a general health district pursuant to R.C. 3709.02 are within the purview of the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. (1979 Op. Att'y Gen. No. 79-102, approved and followed.)

3.The amendments to R.C. 3709.02 enacted by the General Assembly in Am. Sub. H.B. 117, 121st Gen. A. (1995) (eff., in part, Sept. 29, 1995) affect the payments

received by members of a board of health of a general health district under that section and constitute a change in compensation for purposes of the prohibition in Ohio Const. art. II, §20 against in-term changes in compensation. Therefore, a person serving as a member of a board of health of a general health district on the effective date of those amendments may not be paid in the manner specified by those amendments.