Note from the Attorney General's Office:

1937 Op. Att'y Gen. No. 37-748 was overruled by
1981 Op. Att'y Gen. No. 81-011.

in being, sell the land, apply so much of the proceeds as is necessary to the payment of the assessment, interest, penalty and costs, and if there is an excess, let the life-tenant and remainder-man go into a court of equity for the determination of their respective shares to the fund.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

748.

BOARD OF EDUCATION, AFTER ENTERING INTO CONTRACT WITH TEACHERS MAY NOT INCREASE SALARY TO BE RETROACTIVE.

SYLLABUS:

A board of education cannot enter into a contract with a teacher on September 1, 1935, *at a fixed salary, and increase the salary of the teacher at a later date, and make such increased salary retroactive as of September* 1, 1935, *and thereby such teacher receive for the period between September* 1, 1935, *and the date of increase the difference in amount, computed on the basis of such increased salary, in addition to the salary paid by the board for the period from September* 1, 1935, *to the date of increase, in accordance with the terms of the contract.*

COLUMBUS, OHIO, June 18, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your communication, which reads as follows:

> "You are respectfully requested to furnish this department your opinion upon the following:
>
> May a board of education increase the salary of one of its teachers, whose contract commenced on September 1, 1935, and make such increase retroactive to the beginning of the contract; or to any other prior date?"

From additional information secured by personal conference with your department, I am informed that the specific question upon which you desire my opinion is: whether or not a board of education that entered into a contract with a teacher on September 1, 1935, at a fixed

salary, may legally increase the salary of the teacher at a later date and make such increased salary retroactive as of September 1, 1935, and thereby such teacher receive for the period between September 1, 1935, and date of increase the difference in amount, computed on the basis of such increased salary in addition to the salary paid by the board for the period from September 1, 1935, to date of increase, in accordance with the terms of the contract.

The law is well settled in Ohio that a public officer is not entitled to receive pay for services out of the public treasury unless there is some statute authorizing the same. 32 O. J., Section 152, page 1011. See also *Lewis Anderson* vs. *Board of Commissioners of Jefferson County,* 25 O. S., 13.

A teacher's salary is paid from moneys derived from taxation, and therefore, a teacher's right to compensation rests entirely on statutory enactment. The sections of the General Code pertinent to the fixing of salaries of teachers by the board of education, provide as follows:

> "Sec. 7690. Each city, village or rural board of education shall have the management and control of all of the public schools of whatever name or character in the district, except as provided in laws relating to county normal schools. It may elect, to serve under proper rules and regulations, a superintendent or principal of schools and other employes, including, if deemed best, a superintendent of buildings, and may fix their salaries."
>
> "Sec. 7690-1. Each board of education shall fix the salaries of all teachers which may be increased but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

It is to be observed from an examination of the language used in Sections 7690 and 7690-1, General Code, that the board of education is expressly given the power to fix salaries of teachers; that, at any time during the term for which appointment is made, the board of education may increase the salary of a teacher; that, the import of the language of Section 7690-1, infers a clear intent that the salary of a teacher must continue as specified in the contract unless an increase is granted by the board, and that, from the time such an increase became effective the teacher will receive the increased salary; and that, it is impossible to construe the clear and concise language contained in Sections 7690 and 7690-1, supra, in such a manner that expressly or impliedly will

authorize a board of education to increase the salary of a teacher during the term of appointment and then pay the teacher on the basis of such increased salary for the period from the date of the contract to the date upon which the increase granted by the board of education became effective.

In my opinion, the words in Section 7690-1, supra, "shall fix the salaries of all teachers which may be increased but not diminished during the term for which appointment is made," are not sufficient to give retroactive effect to a salary which may be increased. This principle of law was stated in the case of *State, ex rel. Fowler* vs. *Eggers, State Controller, et al.,* 33 Nevada, 533, wherein the Court said:

> "Words in a statute simply specifying that an officer shall receive a designated compensation have no retroactive effect, unless there is something in the language indicating it."

It is a well known rule of law that an administrative board may not expend money except as provided by statute. This principle of law has been clearly enunciated by the Supreme Court of Ohio, in the case of *State, ex rel. Locher, Prosecuting Attorney* vs. *Menning, et al.,* 95 O. S. 97, at page 99, the Court said:

> "The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county."

See also, *State, ex rel. A. Bentley & Sons Co.* vs. *Pierce, Auditor,* 96 O. S., 44.

It is an old and uniformly accepted doctrine that public officers, such as members of the board of education, have no powers except such as are expressly conferred by the statute or necessarily implied from the power so conferred. In 1894, the Supreme Court, in the case of *Board of Education* vs. *Best,* 52 O. S., 138, clearly stated this doctrine at page 152, as follows:

> " The authority of boards of education, like that of municipal councils, is strictly limited. They both have only such

power as is expressly granted or clearly implied, and doubtful claims as to the mode of exercising the powers vested in them are resolved against them."

See also, *The State, ex rel. Clarke* vs. *Cook, Auditor,* 103 O. S., 465; Opinions of the Attorney General for 1916, Volume I, page 122; Opinions of the Attorney General for 1926, Volume I, page 386.

It is to be observed that, Sections 7690 and 7690-1, supra, tested by the foregoing principles of law that an administrative board may not expend money except when power to do so is expressly conferred by the statutes, or, can be implied from the powers expressly conferred, there is no authority for a board of education to pay a teacher on the basis of an increased salary for a period of time extending from the date of the contract to the date upon which the increased salary became effective. The reason for strictly construing statutes pertaining to expenditure of moneys by a board of education for salaries, was well and concisely stated by our Supreme Court in the case of *Porter* vs. *The Trustees of the Cincinnati Southern Railway,* 96 O. S., 29, at page 33, the Court said:

"We think that sound public policy forbids that public officials should be permitted to definitely fix a certain sum to be paid for services to be rendered to the public, and at the same time reserve to themselves the arbitrary power to add to the sum named in the contract after the services are rendered. We think there is much in the contention of counsel for the plaintiff in error that this would open the door to favoritism and fraud."

Sections 28 and 29, Article II of the Constitution of Ohio, provide in part, as follows:

"Sec. 28. The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; * * *"

"Sec. 29. No extra compensation shall be made to any officer, public agent, or contractor, after the services shall have been rendered, or the contract entered into; nor, shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

The term "retroactive law" was defined in the case of *Nelson B. Rairden and Jacob Burnet* vs. *Reuben A. Holden, Adm'r.,* 15 O. S., 207, at page 210, where the Court said:

> "The words 'retrospective' and retroactive,' as applied to laws, seem to be synonymous; and, as such, they are used interchangeably by Mr. Sedgwick in his treatise on constitutional law. In *The Society* vs. *Wheeler,* 2 Gallison's R. 139, a case arising under the constitution and laws of New Hampshire, Mr. Justice Story thus defines a retrospective law. 'Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.' "

It is my opnion: that, in applying the definition of the term "retroactive" to the set of facts herein, that, if the board of education, by virtue of its resolution that increased the salary of a teacher, would pay the teacher on the basis of the increased salary from the date of contract to effective date of increase, said board of education would be giving retroactive effect to the resolution. The teacher was paid in accordance with the salary provided for in the contract, from the date of the contract until the effective date of increase. Additional payment for this period of time would indeed "create a new obligation" and "impose a new duty" upon the board of education "in respect to a transaction or consideration already past."

The persons to whom the terms "officer, public agent and contractor," apply, as used in the first clause of Section 29, Article II, of the Constitution, was clearly stated by the Supreme Court, in the case of *State ex rel. Field et al.* vs. *Williams, Auditor of State,* 34 O. S., 218, at page 220, as follows:

> "This language is very broad, and was intended to embrace all persons who may have rendered services for the public in any capacity whatever, in pursuance of law, and in which the compensation for the services rendered is fixed by law, as well as persons who have performed or agreed to perform services in which the public is interested, in pursuance of contracts that may have been entered into in pursuance of law, and in which the price or consideration to be received by the contractor for the thing done, or to be done, is fixed by the terms of the contract.

> In the first, compensation, in addition to that fixed by law at the time the services were rendered, and, in the second, the allowance of compensation in addition to that stipulated in the contract, is inhibited by the first clause of the section.
>
> The compensation of the realtors as first, and second assistant sergeant-at-arms was fixed by law at five dollars 'for each day's attendance during the session of the general assembly.' S. & S. 696, Sec. 2.
>
> It is unnecessary to determine whether the realtors, while acting as first and second assistant sergeant-at-arms, were or were not 'officers,' within the strict meaning of that word, as usually understood. They were, while discharging their duties, serving the public at a fixed compensation, and were, therefore, whether they be regarded as statutory officers or as public agents, within the meaning of the first clause of the section, which inhibits them from receiving extra compensation after the services were rendered."

According to the decision in the above case, it is unnecessary to determine whether a teacher is an "officer" or "public agent" or "contractor," within the strict meaning of those words, as usually understood. In order for the inhibition contained in Section 29, supra, to apply, it is sufficient: that, the teacher had performed services, "in which the public is interested," from September 1, 1935, to the date of the action by the board of education for the increase, "in pursuance of contracts that may have been entered into in pursuance of law and in which the price or consideration to be received" by the teacher is "fixed by the terms of the contract" and the teacher had been paid for such services rendered.

It therefore is my opinion: that, the teacher, from the date of the contract until the date of the increase in salary, was "serving the public at a fixed compensation and was, therefore a "public agent" in the sense used in Section 29, Article II, of the Constitution, which inhibits a teacher from receiving extra compensation after services rendered; and that, the board of education is not authorized to pay a teacher on the basis of an increased salary for a period of time extending from the date of the contract to the date upon which the increased salary became effective.

A question similar to the one presented herein, is contained in Opinions of the Attorney General for 1919, Vol. I, page 66. The facts in that opinion were: that, the Board of Control of the City of Cleveland, adopted and passed a resolution in March, 1918, which increased the compensation of various employes and provided that such increased

compensation should become operative January 1, 1918, and the increased compensation covering the period from January 1, on, had been paid to such employes. In that opinion the then Attorney General held:

> "1. The resolution of the board of control of the city of Cleveland, adopted March 5, 1918, increasing compensation of certain employes, effective January 1, 1918, is retroactive in so far as it attempts to provide increased compensation for previously rendered services and to create a new obligation on said city and to that extent is violative of Section 28, Article II, of the Constitution of Ohio.
>
> 2. Such resolution is ineffective in law to authorize payment for such previously rendered services, being within the inhibition of Section 29, Article II, of said constitution."

It is therefore my opinion, in specific answer to your question that a board of education may not increase the salary of one of its teachers, whose contract commenced on September 1, 1935, and make such increase retroactive to the beginning of the contract; or to any other prior date.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

749.

APPROVAL—BONDS OF PORTSMOUTH CITY SCHOOL DISTRICT, SCIOTO COUNTY, OHIO, $3,000.00.

COLUMBUS, OHIO, June 18, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Portsmouth City School Dist., Scioto County, Ohio, $3,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above school district dated September 1, 1921. The transcript relative to this issue was approved by this office in an opinion