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ELECTIONS, BOARD OF—MEMBER MAY NOT RECEIVE INCREASE IN COMPENSATION DURING EXISTING TERM—ADDITIONAL COMPENSATION—SECTION 3501.12 RC—BASIS OF POPULATION, TOTAL AREA—REGISTRATION PRECINCTS—REGISTRATION REQUIREMENT IN AREA ESTABLISHED BY DISCRETIONARY ACTION OF BOARD—SECTION 3503.06 RC.

SYLLABUS:

A member of a board of elections may not lawfully receive an increase in compensation during his existing term where such increase consists of the additional compensation provided in Section 3501.12, Revised Code, on the basis of population in the total area comprising registration precincts therein, and where the registration requirement in such area is established by discretionary action of the board concerned under the provisions of Section 3503.06, Revised Code.

Columbus, Ohio, May 16, 1955

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

I have for consideration your request for my opinion in which the following question is raised:

“May a member of a board of elections receive an increase in compensation during his existing term in a situation where such

increase is based upon the allowance made in Sections 3501.12, Revised Code, for 'additional compensation of two dollars for each full one thousand population in the total area consisting of such registration precincts,' and where the requirement of county-wide registration is established during such existing term."

Provision for the additional compensation of members of boards of elections, where the registration of electors is established, is provided in Section 3501.12, Revised Code, which reads in part as follows:

"* * * In counties containing registration precincts, additional compensation of two dollars for each full one thousand population in the total area consisting of such registration precincts in the county shall be allowed; provided the compensation of a member of the board shall not be less than five hundred dollars and shall not exceed five thousand dollars annually. If the population of the total area consisting of such registration precincts in a county is not completely ascertainable from the official reports of the next preceding federal census, the board shall determine the population of such area by using such census reports to ascertain the population of such portions as are reported therein, and by determining the population of the remainder thereof in such manner as it deems proper."

The establishment of a registration requirement is provided for in Section 3503.06, Revised Code, which reads in part as follows:

"In every city which at the last preceding federal census had or which at any local, state, or federal census provided by law has reached a population of sixteen thousand or more, the board of elections shall establish and maintain a registration of all the qualified electors of such city.

"Any municipal corporation of less than sixteen thousand population may, by ordinance, elect to become a registration municipal corporation. When such ordinance is adopted the board shall establish and maintain a registration of voters as in the case of registration cities. The board, in a county containing a registration city, when it is deemed necessary to prevent fraud in elections may require registration of voters in suburban municipal corporations or territory contiguous or adjacent to such registration city. The board of a county contiguous to a county containing a registration city, when it is deemed necessary to prevent fraud in elections, may require registration of voters in precincts adjoining and contiguous to such adjoining county. *The board of any county may, by the vote of a majority of its members, establish and maintain registration of all the qualified electors of such county.* If the members of the board divide equally upon the question establishing and maintaining registration of the qualified

electors of such county or a part thereof, the clerk of such board shall notify the secretary of state of such tie vote, and the secretary of state shall thereupon cast the deciding vote. If a board adopts registration or if a board deems it necessary to publicize information relative to registration, notice shall be published in one or more newspapers having general circulation within the county.
* * *.” (Emphasis added.)

In a situation of this sort it is necessary, first, to have regard to the provisions of Section 20, Article II of the Ohio Constitution, which reads as follows:

“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.”

Although it was held in Opinion No. 659, Opinions of the Attorney General for 1949, page 321, that this constitutional limitation was not applicable in the case of members of boards of elections because such members were not public officers, in *State ex rel. Milburn, et al. v. Pethel*, 153 Ohio St., 1, the Supreme Court held that such members are public officers and expressly held that this provision of Section 20, Article II of the Constitution did preclude a change in the compensation of such members. In this situation it remains only to inquire, whether in the case you have described, there is a change in the compensation of such members of the sort to which this constitutional limitation will apply; or whether this is another instance of an increase being effected upon a “basis” or “formula” similar to that involved in the case of *State ex rel. Mack v. Guckenberger*, 139 Ohio St., page 273. The syllabus in the Mack case reads, in part, as follows:

“3. A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during his term by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court ‘shall not be diminished or increased during his term of office.’”

The theory upon which the reasoning of the court was chiefly based in the Mack case, is that the constitutional limitation therein involved was a limitation of the power of the legislature to act, *during an officer's term*,

to increase or diminish his compensation. This notion was based, in part, on the earlier decision of the court in *State ex rel. v. Raine*, 49 Ohio St., 580, the syllabus which is as follows :

“A statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office, contravenes section 20, of article II, of the Constitution of this state, 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.*”
(Emphasis added.)

Judge Hart, speaking of the inhibition found in Section 14, Article IV of the Constitution, made the following observation :

“* * * The inhibition, according to the language of the Constitution thus directed to the Legislature, is that *it* shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that *basis*, within the contemplation and understanding of both the judge and the people who elect him, is fixed, certain and unchangeable during his term. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits.”

Further, on this point, it was said by Judge Hart :

“* * * The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed *by the Legislature* during the term; that the judge is precluded from using his personal influence or official action *to have the Legislature increase his salary*; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of the present status, albeit the compensation of the judge is made variable, from and after the last federal census becoming effective during his term. * * *.”

(Emphasis added.)

Judge Hart then referred to the provisions of Sections 1 and 20, Article II, Ohio Constitution, the constitutional authority under which the compensation of judges is fixed by the General Assembly, and said :

“* * * The command in the Constitution, ‘shall not be diminished, or increased,’ is in the passive voice, denoting that the

subject (in this case compensation) of which it is the predicate, is not to be acted upon. Acted upon by whom and when? Clearly, by the Legislature and during the 'term.' The only other possible construction is to hold that the Constitution prohibits the Legislature from acting on (increasing or decreasing) compensation prior to the term, if that action fixes a sum, or a standard or basis of computation whereby compensation may vary in amount during the term. *Past experience in this state discredits such construction.* (Emphasis added.)

Judge Hart then referred to Section 20, Article II, Ohio Constitution, and noted that the inhibition therein was almost identical with that contained in Section 14, Article IV of the Constitution.

In view of these pronouncements it seems quite clear that the provisions of Section 20, Article II of the Ohio Constitution are likewise limitations on the action of the legislature and upon the legislature only. Moreover, it is quite clear that the Supreme Court has given sanction to an increase in compensation during an existing term provided such increase results from the operation of a "standard or basis of compensation whereby compensation may vary in amount during term" provided such "standard or basis of computation" is established by a law enacted prior to the beginning of such term.

In the instant case, however, we are concerned with a "standard or basis" which would permit a variance in an officer's compensation which would become operative upon the exercise of such officers discretion in a particular way. In the Mack case, of course, the variance became operative through the happening of events wholly beyond the control of the officer concerned or of any other officer or agency of government. In view of the dissenting opinions in that case we may fairly infer that it would be a difficult task to persuade the court to expand the scope of its decision therein to include the situation in the case at hand. In this connection it is necessary to bear in mind that the constitutional mandate requires the General Assembly to "fix" the compensation of the officers concerned. In the Mack case the court decided that this mandate was met by the establishment of a "formula" which included a variable factor wholly beyond the control of any individual or agency. In the instant case, where the officers concerned would be able, in their discretion, to control one factor by which their own compensation is determined they would be able, in practical effect, to "fix" their own compensation, a function which the constitution has placed with the General Assembly. It is familiar law

that the General Assembly may not delegate its legislative power and it would seem definitely improper to delegate the power to fix an officer's compensation to that officer himself.

In a case of this sort, where a statute is capable of interpretation in either of two ways, one which is in conflict with constitutional limitations and one which is in harmony with such limitations, the latter interpretation is to be preferred. I conclude, therefore, that in enacting the variable compensation provision related to registration requirements set out in Section 3501.12, Revised Code, the General Assembly did not intend thereby to provide for an increase in the compensation of a member of a board of elections during his existing term in a situation where the registration requirements involved is established by the *discretionary* action, under the provisions of Section 3503.06, Revised Code, of such board of elections. In any situation where such requirement is established otherwise than by the discretionary action of the board, however, I perceive no reason why the rule in the Mack case would not apply so as to permit an increase in compensation during term.

Accordingly, in specific answer to your inquiry, it is my opinion that a member of a board of elections may not lawfully receive an increase in compensation during his existing term where such increase consists of the additional compensation provided in Section 3501.12, Revised Code, on the basis of population in the total area comprising registration precincts therein, and where the registration requirement in such area is established by discretionary action of the board concerned under the provisions of Section 3503.06, Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General