

OPINION NO. 75-054

Syllabus:

H.B. 119 does not conflict with Article II, Section 20 of the Ohio Constitution and, therefore, county auditors whose terms of office commence on March 10, 1975 are entitled to the periodic increases in salary provided therein.

To: Vincent E. Gilmartin, Mahoning County Pros. Atty., Youngstown, Ohio
By: William J. Brown, Attorney General, August 7, 1975

I have before me your request for my opinion regarding the constitutionality of H.B. 119 in light of Article II, Section 20 of the Ohio Constitution. H.B. 119 which amended R.C. 325.03 to increase the salary of county auditors became effective on March 7, 1975 by virtue of an emergency clause therein, and provides for an initial increase for the remainder of 1975, and for increments in salary of five percent in each succeeding year

of the auditors' terms with the first increase effective January 1, 1976, the second January 1, 1977, and the final increase effective January 1, 1978. The term of office of county auditors in Ohio commences on March 10, 1975 and continues through March 10, 1979.

Article II, Section 20 of the Ohio Constitution 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.

In a telephone conversation subsequent to your request you agreed that there is no constitutional issue regarding the 1975 increase. Rather your concern is whether the yearly increases for 1976, 1977 and 1978 are violative of Article II, Section 20, inasmuch as those increases will be implemented during the auditors' terms.

At the outset your attention is directed to State ex rel. Mack v. Guckenberger, 139 Ohio St. 273 (1942), the syllabus of which reads in part as follows:

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.'

Although the decision in the above case was directed toward Article IV, Section 14 of the Ohio Constitution, the reasoning of the Court is equally applicable to the situation you describe in your request. Article IV, Section 14 was a constitutional provision which prohibited changes in compensation for judges, if enacted, during their term of office. Here we are concerned with Article II, Section 20 which contains a similar prohibition relative to all officers whose compensation is not provided for elsewhere in the constitution.

The reasoning of the court 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 conclusion was based, in part, on the earlier decision of the court in State ex rel. v. Raine, 49 Ohio St. 580, the syllabus of 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.)

The opinion in the Mack case in discussing the inhibition found in Section 14, Article IV of the Constitution, made the following observation:

[T]he 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.

The Court 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:

[T]he 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.)

The Court also 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.

The reasoning in the Mack case has been consistently followed in numerous opinions of my predecessors. In 1955 Op. Att'y Gen. No. 5199 (approved and followed 1974 Op. Att'y Gen. No. 74-021) my then predecessor quoted extensively from the Court's opinion and in discussing Article II, Section 20 of the Constitution of Ohio, stated at page 235:

"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 1960 Op. Att'y Gen. No. 1832 (approved and followed 1969 Op. Att'y Gen. No. 69-033) my predecessor, citing the Mack case, said at page 665:

Under Section 20 of Article II, Ohio Constitution, the salary of a county court judge may not be diminished or increased during his term of office. This constitutional restriction does not, however, apply 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."

See also 1960 Op. Att'y Gen. No. 1904.

I discussed Article II, Section 20 in 1974 Op. Att'y Gen. No. 74-021 and concluded at page 100:

[T]he Section does not prohibit an officer from receiving, during his term, automatic periodic raises embodied in a statute which became effective prior to the beginning of such term."

Based upon the foregoing, it is apparent that the implementation of yearly increases in the salary of county auditors for the years 1976, 1977 and 1978 provided by H.P. 119 does not violate Article II, Section 20 of the Ohio Constitution. Moreover, it is apparent that Article II, Section 20 of the Ohio Constitution contemplates a change in the compensation of public officers enacted during their term of office and not, as is the case here, one that is enacted prior to the commencement of an officer's term but implemented during such term.

In specific answer to your request, it is my opinion and you are so advised that H.P. 119 does not conflict with Article II, Section 20 of the Ohio Constitution and, therefore, county auditors whose terms of office commence on March 10, 1975 are entitled to the periodic increases in salary provided therein.