

**OPINION NO. 79-102****Syllabus:**

1. Members of the board of health of a general health district are public officers as that term is used in Ohio Const. art. II, §20, and, therefore, may not receive an increase in compensation during their existing terms of office.
2. An increase in a per diem allowance and a mileage allowance paid to cover the actual and necessary expenses incurred during attendance at a meeting of the board of health of a general health district constitutes an increase in compensation of a member of the board which, pursuant to Ohio Const. art. II, §20, may not take effect during an existing term of office.

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**To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio**  
**By: William J. Brown, Attorney General, December 20, 1979**

I have before me your request for my opinion regarding the following question:

Are Board of Health members, indeed, public officers as defined by Article II, Section 20, of the Ohio Constitution, and thereby not eligible to receive increased reimbursement under the terms of House Bill 1009 until reappointment?

R.C. 3709.02 provides for the appointment and compensation of members of a board of health of a general health district. Before the passage of House Bill No. 1009, effective March 8, 1979, the Board members received six dollars per diem and eight cents per mile as compensation for attendance at the meetings of the Board. Members were compensated for up to twelve meetings a year. House Bill No. 1009 amended R.C. 3709.02 to read, in part, as follows:

In each general health district there shall be a board of health consisting of five members to be appointed as provided in section 3709.03 of the Revised Code. The term of office of such members shall be five years from the date of appointment, except that of those first appointed one shall serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed each year. This paragraph does not apply to a combined board of health created under section 3709.07 of the Revised Code.

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. (Emphasis added.)

Thus, the General Assembly has increased the amount of the payments to the members of a board of health for per diem compensation and for reimbursement of mileage expenses, and has also increased the number of payments from a maximum of twelve to an unlimited number for board meetings and to as many as five for board committee meetings.

Increased compensation of a public officer may not, under Ohio Const. art. II, §20, be effected during an officer's existing term. The members of a board of health who held office on March 8, 1979, may not receive the increased amounts during their terms of office if board membership is a public office and if the increased amounts allowed by R.C. 3709.02 constitute "salary" as used in the constitutional provision. Ohio Const. art. II, §20 states:

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.

The indicia of public office are well established in Ohio. They include durability of tenure, the qualifications for the position, and the nature of the duties imposed. State ex rel. Gordon v. Zangerle, 136 Ohio St. 371, 381 (1940). As was stated in State ex rel. Landis v. Board of Commissioners of Butler County, 95 Ohio St. 157, 159 (1917):

The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

Applying the above criteria to the positions held by members of a board of health, it is clear that the members qualify as public officers. As is evident from R.C. 3709.02, set forth above, the members are appointed for a specified term. R.C. 3709.22 sets forth the powers and duties of the board of health. In examining these powers, it is clear that the state has vested the board with an independent governmental function. As was stated in State ex rel. Pansing v. Lightner, 32 N.P. (n.s.) 376, 382-83 (Montgomery County C.P. 1934):

The court is of the opinion that the authority of the District Board of Health is anchored in the fundamental proposition that the protection of health is the exercise of a governmental power, as distinguished from a proprietary act.

The board also possesses the power to act with "speed and independence" so that it may expediently cope with contagious and infectious disease. McGowen v. Shaffer, 65 Ohio L. Abs. 138, 147 (Summit County C.P. 1953). Due to the fact that board members are appointed, that duties are delegated to them by statute, and that the duties so delegated are governmental in nature, I conclude that the members of a board of health of a general health district are public officers.

My conclusion is further supported by the fact that several of my predecessors and I have treated the position as an office in considering the question of the incompatibility of public offices. See, e.g., 1973 Op. Att'y Gen. No. 73-097; 1951 Op. Att'y Gen. No. 787, p. 520.

I turn now to the question whether the increased payments authorized by H.B. No. 1009 constitute "salary," as that term is used in Ohio Const. art. II, §20.

Although there was, at one time, a distinction drawn between compensation and salary, such a distinction is no longer recognized. As was stated in State ex rel. Artmayer v. Board of Trustees, 43 Ohio St. 2d 62 (1975):

The terms "salary" and "compensation" as used in Section 20, Article II of the Ohio Constitution, are synonymous.

The court has also indicated that the determining factor in deciding whether an increase in payments to a public officer violated the Constitution was whether the number of dollars payable to the officer was increased during that officer's term. State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389 (1976).

Relying on State ex rel. Artmayer and State ex rel. Parsons, *supra*, I concluded in 1978 Op. Att'y Gen. No. 78-018 that an increase in per diem payments to an officer, where the officer had held office prior to the effective date of the increase, was a violation of Ohio Const. art. II, §20. See also 1977 Op. Att'y Gen. No. 77-083. The increase in per diem payments to the members of a board of health during their existing terms would, similarly, violate the constitutional provision.

The number of dollars payable to a board member as reimbursement for mileage expenses has also been increased. I conclude that these payments are governed by the rule in State ex rel. Artmayer, *supra*, and would also constitute an increase in salary. Thus, increases, as well, are prohibited during an officer's term existing on March 8, 1979.

Accordingly, it is my opinion, and you are advised, that:

1. Members of the board of health of a general health district are public officers as that term is used in Ohio Const. art. II, §20, and, therefore, may not receive an increase in compensation during their existing terms of office.
2. An increase in a per diem allowance and a mileage allowance paid to cover the actual and necessary expenses incurred during attendance at a meeting of the board of health of a general health district constitutes an increase in compensation of a member of the board, which pursuant to Ohio Const. art. II, §20, may not take effect during an existing term of office.