

OPINION NO. 2013-011**Syllabus:**

2013-011

For purposes of R.C. 325.14, the appointment of a person to fill a vacancy in the office of county engineer constitutes “the commencement of [a] new term of office,” so that the appointee may elect to engage or not to engage in the private practice of engineering or surveying and such election does not violate Article II, Section 20 of the Ohio Constitution.

To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Michael DeWine, Ohio Attorney General, April 15, 2013

You have requested an opinion whether a person appointed to fill a vacancy in the office of county engineer is authorized to elect whether to engage in the private practice of engineering or surveying. You have explained that the county engineer has elected not to engage in the private practice of engineering or surveying. You wish to know, if the county engineer leaves office before the expiration of his term of office, whether the person appointed to serve the remainder of that term will be bound by the current engineer’s election not to engage in the private practice of engineering or surveying, or whether the appointee will be permitted to make an independent election on that matter. You question whether Article II, Section 20 of the Ohio Constitution prevents a person appointed to fulfill an unexpired term in the office of county engineer from making a decision of whether to engage in the private practice of engineering or surveying that differs from his predecessor’s decision on that matter.

To answer your question, we must examine R.C. 325.14, which establishes the compensation of a county engineer. R.C. 325.14 classifies each county engineer, for salary purposes, according to the population of the county that the engineer serves. R.C. 325.14(A); 1993 Op. Att’y Gen. No. 93-006, at 2-34. Salaries are further differentiated on the basis of whether a county engineer engages in the private practice of engineering or surveying while holding office. R.C. 325.14. County engineers who elect not to engage in the private practice of engineering or surveying while holding office are entitled to receive higher salaries than those county engineers who engage in the private practice of engineering or surveying. R.C. 325.14(A); 1986 Op. Att’y Gen. No. 86-009, at 2-36.

R.C. 325.14(B) states, in part, that “[a] county engineer may elect to engage or not to engage in the private practice of engineering or surveying *before the commencement of each new term of office.*” (Emphasis added.) Whether a person appointed to fill a vacancy in the office of county engineer is entitled to make an election under R.C. 325.14(B) depends upon the meaning of the phrase “each new term

of office” as it is used in that section. It is unclear from the language of the statute whether this phrase refers to the four-year statutory term of office of a county engineer, *see* R.C. 315.01, or the period of time during which a particular person serves as county engineer. Because the statute is ambiguous on this point, it is appropriate for us to examine other factors, including the object sought to be attained and the construction of similar statutes, to determine the General Assembly’s intent. *See* R.C. 1.49 (A), (D); *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶20 (2002) (“[i]n examining a statute, if the language is ambiguous, a court may consider laws upon the same or similar subjects in order to determine legislative intent”).

A question similar to yours was addressed in 1998 Op. Att’y Gen. No. 98-024, which considered whether a person appointed to fill a vacancy in the office of prosecuting attorney is authorized to elect whether to engage in the private practice of law. Like R.C. 325.14, the statute establishing the salaries of county prosecuting attorneys provides that a prosecuting attorney “may elect to engage or not to engage in the private practice of law before the commencement of each new term of office.” R.C. 325.11(B). Construing the phrase “new term of office” for purposes of R.C. 325.11(B) as referring to “the period for which an individual is appointed or elected,” the Attorney General reasoned:

The determination whether to engage in private practice is a personal one, and it is appropriate for the rights and obligations that follow from such a determination to attach to the individual, rather than to the office. Because the decision whether to engage in the private practice of law is made for each “new term of office,” the word “term” is most reasonably construed as referring to the “term” served by a particular individual. Therefore, for purposes of R.C. 325.11 and [former] R.C. 325.111, the appointment of an individual to fill a vacancy in the office of prosecuting attorney constitutes “the commencement of [a] new term of office,” so that the appointee may elect to engage or not to engage in the private practice of law.

1998 Op. Att’y Gen. No. 98-024, at 2-130. The foregoing analysis also applies to the situation you have presented. The decision whether to engage in the private practice of engineering or surveying while serving as county engineer is a personal one that is to be made by the person holding that office. The individual officeholder is in the best position to determine whether he may adequately meet the demands of the office of county engineer while pursuing a private practice of engineering or surveying. Accordingly, it is “appropriate for the rights and obligations that follow from such a determination to attach to the individual, rather than to the office.” *Id.*

Further, we perceive no differences between the language of R.C. 325.11 and the language of R.C. 325.14 that would justify giving the phrase “new term of office” a different interpretation for purposes of each statute. Therefore, for purposes of R.C. 325.14, the appointment of a person to fulfill an unexpired term in the office of county engineer constitutes “the commencement of [a] new term of office,” so

that the appointee may elect to engage or not to engage in the private practice of engineering or surveying.

You question whether Article II, Section 20 of the Ohio Constitution prevents a person appointed to fill a vacancy in the office of county engineer from making an election under R.C. 325.14(B) that differs from the previous county engineer's election on that matter. Article II, Section 20 provides that "[t]he 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." (Emphasis added.) The position of county engineer is a public office, and is, therefore, subject to Article II, Section 20's prohibition against in-term changes in compensation. *State ex rel. Mikus v. Roberts*, 15 Ohio St. 2d 253, 239 N.E.2d 660 (1968) (syllabus, paragraph 2). If a person appointed to fill a vacancy in the office of county engineer makes an election regarding the private practice of engineering or surveying that differs from his predecessor's election on that matter, the salary of the appointee will differ from that of his predecessor. *See* R.C. 325.14(A) (county engineers who engage in the private practice of engineering or surveying receive lower salaries than county engineers who do not engage in private practice). For example, if a person is appointed to fulfill the unexpired term of office of the current county engineer, and the appointee elects to engage in the private practice of engineering or surveying, the appointee will be paid a lower salary than the current county engineer, who does not engage in private practice.¹ *See id.* (same as previous parenthetical). You ask whether this reduction in the salary of the office of the Erie County Engineer will violate Article II, Section 20 of the Ohio Constitution.

Article II, Section 20 of the Ohio Constitution does not prevent a person who is appointed to fill a vacancy in the office of county engineer from making a decision of whether to engage in the private practice of engineering or surveying that differs from his predecessor's decision on that matter. While such a decision will cause the salary that is paid to the county engineer to be adjusted accordingly, this change in compensation does not violate Article II, Section 20 of the Ohio Constitution because it does not occur "during [an] existing term" of office. The Ohio Supreme Court has stated that the phrase "during his existing term," as used in Article II, Section 20, applies "strictly to the term to which the officer is appointed or elected and not to the period constituting the statutory term of the office." *State ex rel. Glander v. Ferguson*, 148 Ohio St. 581, 76 N.E.2d 373 (1947) (syllabus, paragraph 1). Article II, Section 20 thus prohibits a change in the compensation of a county engineer during the period for which a particular person is appointed or

¹ An appointee to a vacancy in the office of county engineer who elects not to engage in the private practice of engineering or surveying may, however, engage in the private practice of engineering or surveying for a period of six months after taking office, without any diminution of salary, for the purpose of concluding the affairs of the private practice. *See* R.C. 325.14(B); *cf.* 1998 Op. Att'y Gen. 98-024, at 2-130 to 2-131 (reaching a similar conclusion with regard to an appointee to a vacancy in the office of prosecuting attorney).

elected to serve as county engineer, rather than during the four-year statutory term of the office of county engineer. Therefore, Article II, Section 20 of the Ohio Constitution does not prevent a person appointed to fill a vacancy in the office of county engineer from, prior to taking office, making a decision whether to engage in the private practice of engineering or surveying that differs from his predecessor's decision in that regard. *Cf.* 1978 Op. Att'y Gen. No. 78-054 (syllabus, paragraph 2) (“[a] township trustee, who is appointed to fill an unexpired term in office, may opt to participate in a group health plan paid for in whole, or in part, by the township under R.C. 505.60, without violating [Article II, Section 20 of the Ohio Constitution], even though the previous holder of the office did not participate in the plan, provided that the plan is available to township trustees prior to actual commencement of his holding of the office”); 1978 Op. Att'y Gen. No. 78-023, at 2-54 (according to the court's decision in *State ex rel. Glander v. Ferguson*, “if the general assembly adopts a new pay scale during a term, and a new officer is appointed to fill an unexpired term after the effective date of the amendment, then the appointee is entitled to the newer pay rate since it did not occur during his term in office”).

Based on the foregoing, it is my opinion, and you are hereby advised that for purposes of R.C. 325.14, the appointment of a person to fill a vacancy in the office of county engineer constitutes “the commencement of [a] new term of office,” so that the appointee may elect to engage or not to engage in the private practice of engineering or surveying and such election does not violate Article II, Section 20 of the Ohio Constitution.