

687.

CONTROLLING BOARD—AUTHORITY TO TRANSFER FUNDS—STATE  
PHARMACY BOARD APPROPRIATION.

SYLLABUS:

1. *The Controlling Board may not consent to the transfer of funds for the sole purpose of increasing an appropriation made by the General Assembly for a single salary.*

2. *Such board is not authorized to consent to the transfer of funds from one item to another until it is satisfied that the amount to be transferred is not needed for the purpose for which it was appropriated.*

3. *The Controlling Board is not authorized to approve the transfer of funds from Class "A-2 Wages—Per Diem Five Members of" State Pharmacy Board sufficient to enable the secretary of the State Pharmacy Board to draw a salary at the rate of four thousand five hundred dollars per annum for his services as secretary, the legislature having appropriated four thousand dollars only for such salary.*

COLUMBUS, OHIO, July 6, 1927.

HON. WILBUR E. BAKER, *Secretary, Controlling Board, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion as follows:

"The Board of Control has requested me to secure your opinion as to the power of the board to authorize a transfer to provide additional funds in the following cases. Section 1297 of the General Code provides that the Secretary of the State Board of Pharmacy 'shall receive a salary to be fixed by the board and the necessary expenses incurred in the performance of his official duties.' The board is informed that pursuant to this section the State Board of Pharmacy has fixed the salary of the secretary for the ensuing year and a half at \$4,500.00 per annum. At page 157 of the Act to make General Appropriations, H. B. 502, appears the following item: 'State Board of Pharmacy—Personal Service A-1 Salaries, Secretary six months \$2,000.00, year \$4,000.00'. It is proposed to transfer from 'A-2 Wages per diem five members' of the board the sum of \$750.00 to augment the appropriation made by the legislature. On the above stated facts may such a transfer be legally effected with the approval of the Board of Control?

It is deemed advisable to submit this question for a formal opinion for the reason that similar requests are made in other instances: for example—a request has been made to authorize a transfer of \$1,000.00 to augment the appropriation of \$6,500.00 made by the 86th General Assembly for the purpose of paying the salary of the President of Kent University. Request has also been made for the transfer of \$500.00 in order that the annual salary of the Secretary of the Tax Commission may be increased in that amount and a similar request is made by the Division of Banks and Banking to increase the salary of the Chief Trust Examiner.

In these cases your attention is invited to Section 3 of the Appropriation Act."

Your letter refers to the authority given the State Board of Pharmacy by Section 1297 of the General Code, which reads as follows:

"The state board of pharmacy shall organize by electing a president and a vice president who shall be members of the board, and a secretary who shall be a registered pharmacist in good standing in his profession. Each of the officers so elected shall serve for a term of one year. The secretary shall receive a salary to be fixed by the board, and his necessary expenses incurred in the performance of his official duties. The members of the board shall receive the sum of ten dollars for each day employed in the discharge of their official duties and their necessary expenses while engaged therein."

In exercising the right given to the State Board of Pharmacy to fix the salary of its secretary, it can not exceed the amount made available by the legislature for that purpose.

The present General Assembly in making appropriation for the salary of the secretary of the State Board of Pharmacy (found on page 156 of the Appropriation Act—House Bill No. 5(2)), appropriated for the first six months two thousand dollars and for the succeeding twelve months four thousand dollars. You ask whether these sums can be augmented by the Controlling Board granting authority to expend money from the appropriation made for the purpose of paying the per diem of the members of the Board, sufficiently to pay its secretary a salary of four thousand five hundred dollars per annum.

The authority of the Controlling Board to transfer funds is found in Section 3 of the Appropriation Act, to which you refer and which provides in part as follows:

"The sums set forth in Section 1 of this act, opposite the several classifications of detailed purposes, shall not be expended for any other purposes except as herein provided.

Authority to expend the monies appropriated for 'Total Personal Service' and 'Total Maintenance' in Section 1 of this act otherwise than in accordance with such classification of detailed purposes, but within the purpose for which appropriation is made, may be granted to any department, institution, board or commission for which appropriations are made in said section, by a board to be known as the 'controlling board,' consisting of the governor, or a designated officer or employe, if appointed by the governor for such purpose, the chairman of the finance committee of the house of representatives and of the senate respectively, the attorney general and the auditor of state. The present chairmen of the finance committees shall continue to serve as members of said controlling board notwithstanding the expiration of their respective terms of office as members of the general assembly, until the senate and house of representatives of the succeeding general assembly shall have organized and the chairmen of the respective finance committees thereof have been selected. The governor, or a designated officer or employe, shall be president, and the director of finance shall be secretary of the board; but the director of finance may designate an employe in his department to act as such secretary.

Application for such authority shall be made to the president of the controlling board in writing, and the consent of not less than four members of the controlling board shall be required for the granting of such authority. Said board may authorize the expenditure of monies appropriated in said Section 1 of this act within the purpose for which the appropriation is made, whether included in the detailed purpose for which such appropriations are distributed in said section or not.

\* \* \* \* \*

The provisions of this section are quite broad but I am of the opinion that it was not the intention of the legislature to authorize the Controlling Board to consent to

the transfer of money to increase appropriations upon which the legislature has taken definite action and appropriated a sum for one particular purpose.

In construing this section we must take into consideration the constitutional provisions and other provisions of law. The constitutional provision relative to such appropriations is Section 22 of Article II, which reads in part as follows:

“No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; \* \* \*.”

Section 270-1 of the General Code, which provides that in November before the first meeting of each General Assembly the various state departments, institutions and officers shall submit to the Governor an itemized statement of the amount of money needed for their wants for the biennial period for which the General Assembly will be required to make appropriations; and Section 270-4, General Code, provides that at the beginning of each regular session of the General Assembly the Governor shall submit to it the budget for the current expenses of the state for the biennial period for which the said legislature will be required to make appropriations, together with the request made by the various state officers as set forth in Section 270-1 hereinabove referred to. This is known as the Executive Budget.

I also find that the present legislature has made an appropriation to the Controlling Board for certain purposes. This is found on page 167 of the Appropriation Act (House Bill No. 502). We find therein: “F-8 Contingencies \$10,000.00—\$20,000.00”; also: “To supplement appropriations to state departments and divisions for print paper and printing, transfers to be made subject to the approval of Controlling Board \* \* \* \$20,000.00—\$40,000.00.”

I am informed that for some years past, the appropriation under the heading “Contingencies” has been made for the purpose of permitting the Controlling Board to augment appropriations for salaries where such salaries are increased upon resurvey by the Civil Service Commission.

The General Assembly in pursuance to the constitutional provision above quoted has made appropriations of the amounts which in its judgment it thought proper for all the activities of the state mentioned in the various items of the act. The legislature evidently recognized that there would be changes in conditions during the life of the appropriations which could not be foreseen or considered when making the appropriations, and it was for the purpose of taking care of these conditions that Section 3 was incorporated in the act.

I am of the opinion that it was the intention of the legislature to vest in the Controlling Board authority to consent to the transfer of funds when necessary because of conditions arising after the Appropriation Act was passed by the General Assembly, and which conditions could not be considered by the legislature when passing the act. In other words, the legislature did not intend to grant authority to the Controlling Board to increase a specific appropriation for a single salary, to enable the appointing officer to pay a larger salary to some appointee than the legislature had authorized by specific appropriation. That is to say, when the legislature has made specific appropriation for the salary of a certain officer or appointee, the Controlling Board has no authority to approve the expenditure of a sum from some other item of the Appropriation Act, so as to increase the salary of such officer or appointee over and above the amount fixed by the legislature.

I am of the opinion that the Controlling Board may consent to a transfer within the classification as set forth in said Section 3 to an item which is not for one special object but is in the nature of a lump sum for more than one specific purpose. In this connection, see Opinions, Attorney General, 1921, Vol. II, 820. To hold otherwise would be to hold that the legislature only provided certain items within the Appropriation Act and then gave to the various departments for which the appropriations

were made, subject to the consent of the Controlling Board, power to change these appropriations at will without limit except as to the total amount appropriated for the classes mentioned in Section 3, *supra*. The Appropriation Act as a whole does not disclose that the legislature expressed any such intent.

Before the Controlling Board may consent to a transfer of funds from one item to another within the class specified in said section it must be satisfied that the amount to be transferred is not needed for the purposes for which it was appropriated. That is, such consent may not be given to transfer money from the per diem appropriation for the members of the State Board of Pharmacy to any other item within that class until the Controlling Board is satisfied that the amount appropriated for said per diem is in excess of the amount required for that purpose during the life of the appropriation.

The legislature specifically provided four thousand dollars per annum for the salary of the secretary of the State Pharmacy Board. This provision was made after the State Pharmacy Board had requested an appropriation large enough to pay a salary of four thousand five hundred dollars per annum. By reference to the Executive Budget transmitted by the Governor to the General Assembly for the period of 1927-1928, on page 182, it is found that the Pharmacy Board requested an appropriation for the salary of its secretary for the first six months of the appropriation period in the amount of two thousand two hundred and fifty dollars and for the succeeding twelve months, four thousand five hundred dollars. This request was transmitted in said budget to the legislature with the recommendation of the Director of Finance that the appropriation be made as actually passed by the General Assembly. This is a clear expression of legislative intent which can not be changed except by legislative action.

In passing it is deemed proper to point out that this opinion in nowise affects the right of a person holding two or more compatible offices or positions to draw the salary or compensation fixed for each of such offices or employments. When one of two or more offices or employments is not subordinate to or in any way a check upon the other, and when it is physically possible for one person to discharge the duties of such offices or employments, they are said to be compatible and may be held by the same person. That such person may receive the salary or compensation incident to each and all of such offices has been repeatedly held by this department and by the courts of Ohio and has been recognized by the Supreme Court of the United States. The general rule applicable to situations of this kind is thus stated in 22 R. C. L. 535:

“In the absence of express or implied statutory provisions to the contrary an officer who holds two or more separate and distinct offices not incompatible with each other to each of which compensation is attached may recover the compensation provided by law for each office. In the eyes of the law the same individual is two distinct officers and for this reason entitled to the compensation incident to each office.”

In an opinion of the Attorney General reported in *Opinions of Attorney General 1921*, Volume I, page 317, it was held as follows:

“The office and duties of a criminal court bailiff and those of a court constable are not incompatible and the same person may be appointed to discharge the duties of both offices by the judge or judges of the common pleas court in counties having less than four judges and *may receive the salary for both positions provided however that he is not paid twice for the same services.*”  
(Italics the writer's.)

See also *State ex rel. Harrison vs. Lewis*, 10 O. D. 537; *State ex rel. Taylor vs. Coughlan*, 18 O. D. 289; and *State ex rel. Wolfe vs. Shaffer*, 6 O. N. P. (N. S.) 219.

This principle was recognized and upheld by the Supreme Court of the United States in the case of *United States vs. Saunders*, 120 U. S. 126, in which it was held

that an act of Congress prohibiting the allowance of additional pay or extra compensation to public officers had no application to the case of two distinct offices, places or employments each of which had its own duties and compensation, where such offices, places or employments were legally held by the same person at the same time.

For the reasons above stated it is my opinion that

(1) The Controlling Board may not consent to the transfer of funds for the sole purpose of increasing an appropriation made by the General Assembly for a single salary.

(2) Such board is not authorized to consent to the transfer of funds from one item to another until it is satisfied that the amount to be transferred is not needed for the purpose for which it was appropriated.

(3) The Controlling Board is not authorized to approve the transfer of funds from Class "A-2 Wages—Per Diem Five Members of" State Pharmacy Board sufficient to enable the secretary of the State Pharmacy Board to draw a salary at the rate of four thousand five hundred dollars per annum for his services as secretary, the legislature having appropriated four thousand dollars only for such salary.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

688.

BOYS' INDUSTRIAL SCHOOL—WHEN BOY OVER EIGHTEEN YEARS  
OLD MAY BE ADMITTED.

*SYLLABUS:*

*A boy over eighteen years of age may be admitted to the Boys' Industrial School, when the juvenile court had duly committed him thereto prior to his eighteenth birthday, provided said order of commitment has not been rescinded or suspended, requiring further order of commitment after the boy's eighteenth birthday.*

COLUMBUS, OHIO, July 6, 1927.

MR. A. M. BUESCHER, *Superintendent, The Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads as follows:

"Our attention has been called to an opinion of the Attorney General issued February 5, 1925, No. 2201, ruling that girls over eighteen years of age 'may be admitted to the Girl's Industrial School when the Juvenile Court, prior to her eighteenth birthday, has duly committed her thereto, providing the said order of commitment has not been rescinded or suspended, requiring further order of commitment after said eighteenth birthday.'

The Juvenile Court of Cuyahoga County now raises the question as to whether this ruling should not apply to this school also.

We have not accepted boys at this institution beyond eighteen years of age regardless of the date of commitment, and I would like an opinion from you on this point."

The opinion of this office to which you refer appears in the Opinions of the Attorney General, 1925, page 63, the syllabus of which reads: