Note from the Attorney General's Office:

1976 Op. Att'y Gen. No. 76-015 was overruled in part by 1981 Op. Att'y Gen. No. 81-011.

OPINION NO. 76-015

Syllabus:

After negotiating and determining increased wage rates, a county engineer is without authority to pay additional compensation to make such increases retroactive to the beginning of the calendar or fiscal year for services which have already been performed and for which compensation has been paid in accordance with a previously existing contract or wage schedule.

To: John E. Moyer, Erie County Pros. Atty., Sandusky, Ohio
By: William J. Brown, Attorney General, March 10, 1976

Your request for my opinion reads as follows:

> "Starting at the beginning of each calendar year, the salaried employees of the County Engineer's department are paid at existing rates until the annual appropriation resolution is adopted by the Board of County Commissioners (which usually occurs in February or March); and upon adoption of the annual

appropriation resolution, salaries are paid at the increased rates and the County Engineer submits a supplemental payroll to provide for the payment to each salaried employee of an additional amount sufficient to render his salary increase effective as of the first of the year. The County Engineer has inquired whether such course of action is lawful.

"The County Engineer also has informed me that most of the hourly employees in his department are members of a labor union. Wage rates are negotiated annually (usually upward) and when an agreement is reached (sometimes as late as the month of May), the employees request that their wage rate increases be retroactive to the first of the year. The increases usually have been anticipated and the necessary funds have been provided in the annual appropriation resolution. The County Engineer has inquired whether such retroactive treatment of wage increases would be lawful."

In the situation outlined in your request letter, the Board of County Commissioners may pursuant to R.C. 5705.38 pass a temporary appropriation at the beginning of the year in an amount sufficient to cover the existing compensation requirements for the employees in the county engineer's office. Some time before April 1, the Board then passes the annual appropriation which contains sufficient funds to pay salaries at increased rates which have been or will be finally agreed on by the county engineer and the employees in his department. The question posed then is whether the county engineer can authorize additional compensation retroactive to January 1 equal to the difference between the newly agreed upon compensation rates and the previously existing compensation rates.

It should first be noted that the county engineer is by statute made the appointing authority for all employees in his department. In this regard I would refer you to R.C. 325.17 which authorizes the county officers enumerated in R.C. 325.27, including the county engineer, to appoint necessary employees. R.C. 325.17 may be set out in pertinent part as follows:

"The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them, and shall file certificates of such action with the county auditor. Such compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for such office. . . ."
(Emphasis added.)

It is clear then that the county engineer as the appointing authority may determine the rates of compensation to be paid to employees in his office. 1975 Op. Att'y Gen. No. 75-078. However, it does not follow from this that he may authorize the payment of additional compensation retroactively for services already rendered and for which compensation has already been paid in accordance with previously existing wage rates.

The office of county engineer, like the board of county commissioners is a creature of statute. As such, the county engineer possesses only such powers as may be expressly conferred upon him by statute, or as may be required by necessary implication to perform the duties so imposed. State, ex rel. Clark v. Cook, 103 Ohio St. 465 (1921); 1971 Op. Att'y Gen. No. 71-092.

Furthermore, in State ex rel. Locher v. Menning, 95 Ohio St. 97 (1916), the Supreme Court of Ohio indicated that this principle is to be adhered to strictly with regard to financial transactions. Although the Court was addressing itself to a board of county commissioners, the principle expressed applies equally to a county engineer. The Court stated at p. 99 that:

> "The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county."

See also State, ex rel. Bentley v. Pierce, 96 Ohio St. 44 (1917). The reason for strictly construing statutes pertaining to the expenditure of money was well stated by the Supreme Court in the case of Porter v. The Trustees of the Cincinnati Southern Railway, 96 Ohio St. 29, 33 (1917):

> "We think that sound public policy forbids that public officials should be permitted to definitely fix a certain sum to be paid for services to be rendered to the public, and at the same time reserve to themselves the arbitrary power to add to the sum named in the contract after the services are rendered. We think there is much in the contention of counsel for the plaintiff in error that this would open the door to favoritism and fraud."

While R.C. 325.17 authorizes a county engineer to "fix compensation", it contains no language which specifically authorizes the payment of additional compensation for services already performed. Nor is such authority necessarily implied by any language found in that Section.

In this regard I would also direct your attention to Article II, Section 29, Constitution of Ohio, which reads:

> "No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

Article II, Section 29, Constitution of Ohio, is broad in its scope, and its prohibition applies to all persons in public employment. On this point see State ex rel. Field v. Williams, 34 Ohio St. 218 (1877), in which the Supreme Court discussed this Section and said at p. 219:

> "The first clause of the section quoted inhibits the allowance of extra compensation to any officer, public agent, or contractor, after the services shall have been rendered or the contract entered into.
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> "This language is very broad, and was intended to embrace all persons who may have rendered services for the public in any capacity whatever, in pursuance of law, and in which the compensation for the services rendered is fixed by law, as well as persons who have performed or agreed to perform services in which the public is interested, in pursuance of contracts that may have been entered into in pursuance of law, and in which the price or consideration to be received by the contractor for the thing done, or to be done, is fixed by the terms of the contract.
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> "In the first, compensation, in addition to that fixed by law at the time the services were rendered, and, in the second, the allowance of compensation in addition to that stipulated in the contract, is inhibited by the first clause of the section."

See also 1975 Op. Att'y Gen. No. 75-048, in which I discussed a school district's authority under R.C. 3319.08 and R.C. 3319.081 to effect salary increases for teachers and non-teaching employees. In that opinion I noted that authority for an increase in salaries was specifically provided by statute, and that the statutes in question were both passed by greater than a two-thirds majority vote.

It is clear then that the public policy of Ohio, as reflected in the constitution and the statutes, requires that the authority of the state or its political subdivisions to pay additional compensation retroactively for services already rendered must be strictly construed and cases of doubt must be resolved against such authority. I must, therefore, conclude that in the absence of a statute, passed by a two-thirds vote of each house of the General Assembly and specifically authorizing the county engineer to pay such additional compensation, he is without authority to do so.

In specific answer to your question it is my opinion, and you are so advised that after negotiating and determining increased wage rates, a county engineer is without authority to pay additional compensation to make such increases retroactive to the beginning of the calendar or fiscal year for services which have already been performed and for which compensation has been paid in accordance with a previously existing contract or wage schedule.