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PUBLIC OFFICERS—CHANGE OF SALARY DURING TERM—
CONSTITUTIONAL PROHIBITION NOT APPLICABLE—
WHEN MEMBERS OF BOARD OF PROFESSIONAL EN-
GINEERS AND SURVEYORS—PER DIEM PAYMENTS—
§4733.05, R.C. ART. II, §20, OHIO CONSTITUTION; A, SB 192,
103 GA.

SYLLABUS:

1. The provisions of Section 20 of Article II, Ohio Constitution, do not preclude a change in the compensation of an officer during his existing term where such compensation is based on per diem payments. (Opinion No. 978, Opinions of the Attorney General for 1951, page 825, approved and followed.)

2. Under the provisions of Section 4733.05, Revised Code, as amended by Amended Senate Bill No. 192 of the 103rd General Assembly, effective October 21, 1959, members of the state board for professional engineers and surveyors are entitled to receive twenty-five dollars for each day spent in actually attending to the work of the board or of any of its committees.

Columbus, Ohio, January 22, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Section 4733.03 of the Revised Code provides for the creation of a Board of Registration for professional engineers and surveyors. The Board consists of four professional engineers and one surveyor. One member shall be appointed by the Governor, with the advice and consent of the Senate, each year as the respective terms of the present incumbents expire and shall serve for the term of five years.

“Amended Senate Bill No. 192, which became effective October 21, 1959, changes the compensation of the members of the State Board of Registration from \$15.00 per diem to \$25.00 per diem. All of the five members now constituting the Board were appointed and were receiving compensation at the rate of \$15.00 per diem prior to October 21, 1959.

“An opinion is respectfully requested as to whether or not any of such members, or all of such members, now serving shall

be entitled to a per diem rate of \$25.00 per day on and after October 21, 1959. Attention is directed to Article II, Section 20 of the Ohio Constitution prohibiting a change of salary during an existing term. Likewise, to the decision of the Ohio Supreme Court, 148 O.S. 581, *State ex rel. Glander v. Ferguson, Auditor*. There is also a question as to whether a per diem allowance is 'salary' within the contemplation of the constitutional provision and the interpretation of the court in the above cited case.

"In this connection, I might also cite the case of *Peay v. Nolan*, 157 Tennessee 222 in which that court held that the term 'per diem' is synonymous with 'salary'."

As stated in your letter, the per diem compensation of members of the state board for professional engineers and surveyors was formerly fifteen dollars. As amended by Amended Senate Bill No. 192 of the 103rd General Assembly, effective October 21, 1959, Section 4733.05, Revised Code, reads as follows :

"Each member of the state board of registration for professional engineers and surveyors shall receive the sum of twenty-five dollars per diem when actually attending to the work of the board or of any of its committees and for the time spent in necessary travel; and in addition thereto, shall be reimbursed for all actual traveling, hotel, and other expenses necessarily incurred in carrying out sections 4733.01 to 4733.23, inclusive, of the Revised Code."

The only change in the section is the substitution of the words "twenty-five" for the word "fifteen," the per diem compensation being increased ten dollars.

Section 20 of Article II, Ohio Constitution, referred to in your letter, 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."

It is well settled that the word "officers," as used in Section 20 of Article II, Ohio Constitution, includes appointive as well as elective officers (*State, ex rel. McNamara v. Campbell*, 94 Ohio St., 403), and I am of the opinion that members of the board here in question are "officers" within the meaning of such constitutional provision.

The question to decide, therefore, is whether the change in the per diem compensation of such members during their existing terms may be said to "affect the salary" of such officers within the purview of the constitutional provision here concerned. The answer to such question depends upon the meaning of the word "salary" as so used. The per diem of the members of the board is obviously "compensation." Also, it is clear that all "salary" is "compensation." Whether or not such per diem "compensation" should be considered "salary" within the meaning of the constitution will be decisive of the question.

Over the years there have been many differing conclusions as to whether the words "compensation" and "salary," as used in Section 20 of Article II, Ohio Constitution, are or are not synonymous, or may or may not be used interchangeably. The most recent decisions, however, hold to the view that the terms are not synonymous and are not used interchangeably. In this regard, the syllabus, in Opinion No. 978, Opinions of the Attorney General for 1951, page 825, reads:

"1. The terms 'compensation' and 'salary,' as used in Article II, Section 20 of the Constitution of Ohio, are not synonymous. (Opinion No. 749, Opinions of the Attorney General for 1939, page 947, approved and followed.)

2. Under the provisions of Article II, Section 20 of the Constitution of Ohio, the Legislature may change the per diem compensation of any officer whose total compensation is based upon such per diem payment and who receives no 'salary' in the sense of an annual or periodical payment for services dependent upon the time and not on the amount of service rendered. (Opinion No. 387, Opinions of the Attorney General for 1945, page 473, distinguished.)

"3. Under the provisions of Section 1317, General Code, as amended by Amended Senate Bill No. 365, 99 General Assembly, effective September 18, 1951, members of the Ohio State Dental Board are entitled to receive \$15.00 for each day actually employed in the discharge of official duties after the effective date of such amendment."

You will note that in Opinion No. 978, *supra*, the then Attorney General, was considering a situation similar to that raised by your present request, an increase in the per diem compensation of members of a state board. In reaching his conclusion, the Attorney General stated, at page 833 of the opinion:

“In Opinion No. 749, Opinions of the Attorney General for 1939, Vol. II, page 947, it was held that the terms ‘compensation’ and ‘salary,’ as used in Article II, Section 20 of the Constitution of Ohio are not synonymous and that township trustees and clerks in office on September 2, 1939, the effective date of House Bill No. 477 of the 93rd General Assembly increasing the fees for such officers, are subject to the provisions thereof and could receive such increased compensation. This opinion relied principally on the cases of *Thompson v. Phillips* and *Gobrecht v. Cincinnati, supra*, and also cited the case of *State, ex rel. Taylor v. Madison County, supra*, and the 1917 opinion of the Attorney General.”

The case of *Gobrecht v. Cincinnati*, 51 Ohio St., 68, referred to in Opinion No. 978, *supra*, also dealt with a situation similar to that here under consideration. Headnotes 1 and 2 of that case read as follows :

“1. Compensation of a public officer fixed by a provision that ‘each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance,’ is not ‘salary’ within the meaning of section 20, of article 2, of the constitution, which provides that ‘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.’

“2. An increase in the compensation of such officer during his term is not prohibited by the constitution.”

In accordance with past decisions in this regard, therefore, I am of the opinion that as to officers who do not receive any fixed salary, but whose compensation is derived solely on a per diem payment, the provisions of Section 20 of Article II, Ohio Constitution, do not apply to increasing or decreasing such compensation during their terms of office—such compensation not being considered “salary” within the purview of said constitutional provision.

Accordingly, in specific answer to your question, it is my opinion and you are advised :

1. The provisions of Section 20 of Article II, Ohio Constitution, do not preclude a change in the compensation of an officer during his existing term where such compensation is based on per diem payments. (Opinion No. 978, Opinions of the Attorney General for 1951, page 825, approved and followed.)

2. Under the provisions of Section 4733.05, Revised Code, as amended by Amended Senate Bill No. 192 of the 103rd General Assembly, effective October 21, 1959, members of the state board for professional engineers and surveyors are entitled to receive twenty-five dollars for each day spent in actually attending to the work of the board or of any of its committees.

Respectfully,

MARK McELROY
Attorney General