

compensation has been made by the Director of the Department of Adjusted Compensation.

An examination of the matter has been made and upon the advice of Hon. W. B. Woodson, Acting Judge Advocate General of the Navy, that midshipmen at the United States Naval Academy have been regarded as officers on active duty (Decision of the Department, February 8, 1922, File No. 5252-131:1), it is the opinion of this department that they should be so treated and regarded as entitled to receive the Ohio soldiers' adjusted compensation under the recent amendment, when meeting all requirements.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3052.

APPROVAL, BONDS OF MARION COUNTY IN AMOUNT OF \$28,500 FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, May 2, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

3053.

GENERAL ASSEMBLY—CHAIRMEN OF SENATE AND HOUSE FINANCE COMMITTEES OF 84th GENERAL ASSEMBLY—NOT ENTITLED TO PER DIEM COMPENSATION PROVIDED BY SECTION 270-6 AND 2312 G. C. FOR SERVICES AS MEMBERS OF CERTAIN BOARDS—MAY BE REIMBURSED FOR NECESSARY EXPENSES.

The chairmen of the Senate and House Finance Committees of the 84th General Assembly are not entitled to receive the per diem compensation provided for by sections 270-6 and 2312 of the General Code, for services rendered by them as members of the Sundry Claims, Emergency, and Controlling Boards; but they may be reimbursed for necessary expenses incurred in discharging the duties imposed upon them by those sections and the general appropriation bill. Section 31, of Article II, Ohio Constitution, considered and applied.

COLUMBUS, OHIO, May 3, 1922.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—In answer to your recent inquiry as to whether or not the Chairmen of the Senate and House Finance Committees of the 84th General Assembly are entitled to receive the per diem and expenses provided for them as members of the Emergency Board and Controlling Board by section 2312 of the General Code, as amended in 109 O. L., p. 233, and also the per diem and expenses provided

for them as members of the Sundry Claims Board by section 270-6 of the General Code, as amended in 108 O. L., part 1, p. 921, I beg to submit the following:

The Emergency Board was created by act of the General Assembly passed April 18, 1892 (89 O. L., p. 407). The forerunner of that act was the act passed March 11, 1889 (86 O. L., p. 76). The act of April 18, 1892, authorized the payment of necessary expenses of the two chairmen, but made no provision for a per diem compensation. The same is also true of the amendatory acts found in 103 O. L., p. 445; 106 O. L., p. 182; 109 O. L., p. 130. The provisions for a per diem compensation, in addition to necessary expenses, was made for the first time by the 84th General Assembly, when it amended section 2312 of the General Code. (109 O. L., p. 233). The latter act was passed April 27, 1921, and became effective on August 14, 1921.

The Sundry Claims Board was created by act of the General Assembly passed March 20, 1917, and which became effective on June 29, 1917. See 107 O. L., p. 532, enacting section 270-6 of the General Code. That act provided for the payment of the necessary expenses of the two chairmen, but made no provision for a per diem compensation. The act was amended by the act passed June 18, 1919 (108 O. L., p. 921), and for the first time provided a per diem compensation for the two chairmen, in addition to their necessary expenses. That act became effective September 30, 1919.

The Controlling Board *co nomine*, was created by the general appropriation bill passed March 21, 1917 (107 O. L., p. 350). Its forerunner was the general appropriation bill passed March 12, 1915 (106 O. L., p. 100), which created "a board" with powers and duties corresponding to the Controlling Board. Both acts provided for the payment of the necessary expenses of the two chairmen, but made no provision for a per diem compensation. The same is likewise true of the general appropriation bill passed May 28, 1919 (108 O. L. part 1, p. 912), and of the general appropriation bill passed May 12, 1921 (109 O. L., p. 501). However, the 84th General Assembly in its act passed April 27, 1921, amending section 2312 of the General Code, relating primarily to the Emergency Board, also provided therein that the two chairmen, when acting as members of the Controlling Board, should each be paid a per diem compensation, as well as necessary expenses (109 O. L., p. 233).

The chairmen of the Senate and House Finance Committees are members of the General Assembly, and it is by reason of such membership that they were eligible to be designated or appointed chairmen of the two legislative committees, and it is also by reason of their respective chairmanship that they became and are members of the Emergency, Sundry Claims, and Controlling Boards. Membership in the General Assembly is a connecting link, so far as the two chairmen are concerned, between the three boards, since their membership on the three boards finds its source in membership in the General Assembly.

Under the Ohio Constitution of 1802, members of the General Assembly were authorized to receive a per diem of not more than two dollars during attendance and certain mileage (sec. 19, Art. I), and the per diem mode of compensation was continued under the Constitution of 1851 until January 1, 1880, when the act of June 20, 1879, commonly called the "Revised Statutes of 1880", became effective. See 50 O. L., 117; 59 O. L., 114; 63 O. L., 65; R. S. 1880, section 40. Beginning with the "Revised Statutes of 1880", section 40, and continuing to the present time, the compensation of the members has been on a salary basis, with mileage, ranging from \$1,200.00 for the "term of office" to \$1,000.00 "a year during * * * term of office", with mileage. See 77 O. L., 85; 86 O. L., 347; 97 O. L., 316; 98 O. L., 8; 98 O. L., 287; 102 O. L., 274; 108 O. L., Pt. 1, 262; section 50 G. C.

Beginning with the Act of March 3, 1852 (50 O. L., p. 117), the compensation of members of the General Assembly has been fixed under authority of section 31, of Article II, of the Ohio Constitution, which reads as follows:

"Sec. 31. The members and officers of the General Assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office."

The statute in force at the time the chairmen of the Senate and House Finance Committees of the 84th General Assembly became members of that assembly, was section 50 of the General Code, passed April 15, 1919, effective August 10, 1919. The statute reads as follows:

"Sec. 50. Every member of the General Assembly shall receive as compensation a salary of one thousand dollars a year during his term of office. Such salary for such term shall be paid in the following manner:—two hundred dollars in monthly installments during the first session of such term and the balance of such salary for such term at the end of such session.

Each member shall receive the legal rate of railroad transportation each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session. If a member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

After careful consideration the conclusion has been reached that section 31, of Article II, of the Ohio Constitution disposes of the question you have submitted, and that, by reason thereof, the chairman of the Senate and House Finance Committees of the 84th General Assembly cannot lawfully be paid the per diem compensation provided in the acts above mentioned for services rendered by them as members of the Emergency, Sundry Claims, and Controlling Boards.

The per diem provision of the amendatory act passed April 27, 1921 (section 2312 of the General Code), when applied to the two chairmen of the Senate and House Finance Committees of the 84th General Assembly, would also be subject to the objection of being inconsistent with the policy of sections 19 and 20, of Article II, of the Ohio Constitution,—the former section prohibiting the appointment of a senator or representative to an office the emoluments of which are increased during his term of office, and the latter forbidding that any change be made in the salary of any officer during his term of office.

In answer to a possible suggestion that the chairmen of the Senate and House Finance Committees, while serving on one or more of the three boards mentioned, are holding an office different from or independent of their office as members of the General Assembly, for which compensation may rightly be allowed without violating section 31, of Article II, of the Ohio Constitution, it may be remarked that section 4 of Article II, of the Ohio Constitution, provides that no

person holding any lucrative office under the authority of the State shall be eligible to or have a seat in the General Assembly. The suggestion as to independent offices, however, has, we believe, been fully met and disposed of in a former part of this opinion.

A circumstance peculiar to the Sundry Claims Board should be noticed before closing this part of the opinion. The provision of section 270-6 of the General Code, relating to that board, and fixing a per diem compensation to be paid to the chairmen of the Senate and House Finance Committees, was enacted prior to the beginning of the terms of office of the present chairmen as members of the General Assembly, and from this it might be contended, that the compensation having been provided for prior to the beginning of the present terms of office of the members of the 84th General Assembly, the provision of section 31, of Article II of the Ohio Constitution would not be violated in allowing the two chairmen the compensation so provided since there would be no change in their compensation during their terms of office, etc. This apparently is arguing in a circle, for, as already pointed out, the source of membership on the Sundry Claims Board is membership in the General Assembly. The latter membership is the point of beginning,—not membership on the board. The compensation of members of the General Assembly having been fixed by law prior to the beginning of their terms as members of that body, it cannot, by any devise, be changed or increased by the creation of new boards by legislation or by making them ex officio members of such boards. The true rule is, we believe, that where membership on a board created by legislation is necessarily and primarily based on membership in the General Assembly, the member must be content with the compensation allowed him as a member of the General Assembly. The situation, reduced to its last analysis, is nothing more or less than the imposition of additional duties, for which extra compensation is not permitted.

The most difficult question, however, is whether or not the two chairmen are entitled to receive the necessary expenses authorized to be paid to them by the acts above mentioned. Whether or not section 31, of Article II, of the Ohio Constitution prohibits the payment of expenses is not sufficiently clear. The constitutional provision referred to appears to be ambiguous in this respect. It could be argued with much show of reason, on the one hand, that that section only prohibits allowances or perquisites in the nature of compensation, gain, profit, or reward, or gratuities, or lump sum advancements made in anticipation of expenses which might not be incurred, as distinguished from reimbursement for expenses actually incurred and paid, while on the other hand it might be contended with some plausibility that it was intended to prohibit the payment of expenses under any circumstances. The practical construction appears to have been in favor of the construction first mentioned, and heretofore that construction has never been questioned, so far as I have been able to ascertain. Some definitions of the words "allowance" and "perquisites" apparently exclude, or rather do not include the idea of reimbursement for expenses actually incurred, but treat the words as involving the idea or element of gain, profit, or reward, which cannot be said of or applied to money returned to a person to replace private funds used in paying expenses incurred in the discharge of public duty. In the latter case there would be no gain, profit or reward, but merely a return of the exact amount advanced from private funds. See *Van Sant vs. State*, 96 Md. 110, 128; *State vs. Sheldon*, 78 Neb. 552, 554, 555; *Brandon vs. Askew*, 172 Ala. 160, 167, 168.

In view of the ambiguity and of the practical construction referred to, I am

of the opinion that the custom of reimbursing the two chairmen for necessary expenses is not in violation of the constitution or laws of the state.

Respectfully,
JOHN G. PRICE,
Attorney-General.

Note:—From personal observation and intimate knowledge of the diligent efforts on the part of Senator Miller and Representative Carpenter to perform the duties of their offices honestly and conscientiously, it is certain that neither of them would accept, much less attempt to procure, any public funds which they did not honestly believe they were entitled to receive. In other words, the Attorney General wishes it to be understood that he does not question the good faith of either of the men referred to.

3054

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENTS,
HOLMES, KNOX, WASHINGTON AND GEAUGA COUNTIES.

COLUMBUS, OHIO, May 5, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

3055.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS,
MARION COUNTY.

COLUMBUS, OHIO, May 5, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

3056.

APPROVAL, REFUNDING BONDS OF URICHSVILLE CITY SCHOOL
DISTRICT IN AMOUNT OF \$29,000.

COLUMBUS, OHIO, May 5, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio