886.

SUPERINTENDENT OF SCHOOLS—CITY—SALARY INCREASE DURING TERM OF EMPLOYMENT UNLAWFUL.

SYLLABUS:

A board of education of a city school district may not lawfully increase the salary of the superintendent during the term for which he was appointed.

COLUMBUS, OHIO, September 18, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your recent communication reads:

> "May the salaries of the superintendents of city schools be increased during the term for which the employment is made?
>
> In this connection we call your attention to the fact that the Supreme Court has held that the salaries of county superintendents may not be increased during the terms for which they are employed, and a former Attorney General has held that the salaries of city superintendents may not be increased during the term for which they are employed.
>
> We also call your attention to the decision of the Common Pleas Court, Cuyahoga County, in which that court held that a city superintendent's salary might legally be increased during his term. We also call your attention to the fact that this judgment rendered in the Common Pleas Court of Cuyahoga County, was entered in the record without notice to the Attorney General as provided by Sec. 286 of the General Code; that thereafter the Attorney General attempted to secure a reopening of the case for the purpose of appealing to the higher courts. In this attempt he was successful in the Court of Appeals of Cuyahoga County, but the Supreme Court overruled the Court of Appeals.
>
> We are now undecided as to what action should be taken with reference to increases in the salaries of city superintendents during the terms for which they are employed."

In connection with your inquiry it will be profitable first to consider the case of *State, ex rel. Clarke* vs. *Cook,* 103 O. S. 465. The question under consideration in that case was whether a board of education could legally increase the salary of a county superintendent of schools during the term for which he was appointed. The sections of the General Code considered were Section 4744, which requires the board of education to appoint a county superintendent for a term not longer than three years, and Section 4744-1, which provides in part:

> "The salary of the county superintendent shall be fixed by the county board of education to be not less than $1,200.00 per year."

In that opinion it was held that the salary could not be changed. The following is quoted from the body of said opinion by Judge Wanamaker:

> "The express power to fix a salary does not grant by implication the power to unfix such salary. The exercise of the power for the full three-year term, agreeable to the statute, exhausts the power conferred by the statute. The power to change after once having fixed the term and salary, to

employ the language of the Locher case, supra, must be 'clear and distinctly granted.' The power not being so granted to the board of education cannot be exercised by the board of education, and its attempted exercise thereof is ultra vires. The action of the board in attempting to change the salary of the county superintendent, after once fixed, is illegal and void under the statute."

However, an examination of this opinion discloses that the court was of the opinion that such a change in salary would be in violation of Section 20, Article II of the Ohio Constitution, which in substance provides that no change shall affect the salary of any officer during his existing term unless the office be abolished. The court apparently reached its conclusion in a great measure by reason of the fact that the statutes relating to such superintendent designated him as "in all respects the executive officer of the county board of education." The court indicated that in the use of such language the Legislature had in mind the constitutional provision hereinbefore referred to. However, the court apparently concluded that notwithstanding such superintendent was an officer within the meaning of Section 20, Article II of the constitution, the statute authorizing the fixing of his term, and salary, did not authorize the board of education to unfix it or take further action after having once made the appointment, fixed the term, and indicated the salary. In other words, in the absence of language in the statute which actuated the court to conclude that the superintendent was an officer within the meaning of the constitution, the conclusion of the court would have been the same relative to the power of the board to increase his salary.

This brings us to a consideration of the provisions of the statutes relating to the appointment, term, and fixing of salary of the superintendents of city schools.

Section 7702, General Code, provides:

"The board of education in each city school district at a regular meeting, between May 1st and August 31st, shall appoint a suitable person to act as superintendent of the public schools of the district, for a term not longer than five school years, beginning within four months of such appointment and ending on the 31st day of August."

Provided, that in the event of a vacancy occurring in the office of the superintendent prior to May 1st, the board of education may appoint a superintendent for the unexpired portion of that school year.

Provided, also, that if the vacancy occur through resignation or removal for cause, the superintendent thus resigning or removed shall be ineligible for reappointment to such office until after the reorganization of the board of education following the next general election of members of such board."

Section 7703, which relates to the powers and duties of such superintendent, provides:

"Upon his acceptance of the appointment, such superintendent, subject to the approval and confirmation of the board, may appoint all the teachers, and for cause suspend any person thus appointed until the board or a committee thereof considers such suspension, but no one shall be dismissed by the board except as provided in section seventy-seven hundred and one. But any city or exempted village board of education, upon a three-fourths vote of its full membership, may re-employ any teacher whom the superintendent refuses to appoint. Such superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and perform such other duties as the board de-

termines. He must report to the board annually, and oftener if required, as to all matters under his supervision, and may be required by it to attend any and all of its meetings. He may take part in its deliberations but shall not vote."

It will be observed that the two sections above mentioned do not provide for the fixing of the salary by the board of education. However, Section 7690, General Code, which must be construed in connection with the two sections last mentioned, and which relates to each city, village, or rural board of education, provides, among other things:

'It may elect, to serve under proper rules and regulations, a superintendent or principal of schools and other employes, including, if deemed best, a superintendent of buildings, and may fix their salaries."

It will be noted in this connection that Section 7690-1, General Code, expressly requires each board of education to fix the salaries of all teachers, and expressly provides that such salaries "may be increased but not diminished during the term for which the appointment is made."

In view of the foregoing, it is apparent that a board of education of a city school district is authorized to appoint a superintendent for a term not exceeding five years, and further is authorized to fix his salary.

It therefore appears that in so far as the power of appointment and fixing of the salary of a city superintendent is concerned, it is practically the same as the power granted under Sections 4744 and 4744-1, supra, relating to a county superintendent.

It is a debatable question as to whether or not a city superintendent is an officer within the meaning of Section 20, Article II of the Ohio Constitution. While the major duties of each superintendent with reference to superintending schools, appointing teachers, etc., are the same, there is no such provision relative to the city superintendent being the executive officer of the board of education, and which was referred to in the Cook case, supra, in connection with the status of the county superintendent. Furthermore, in the case of *Ward* vs. *Board of Education,* 21 O. C. C. 699, the court in considering the status of a city superintendent of schools under statutes which were in substances the same as now exist relative to his appointment, terms, and fixing of his salary said, as set out in the first branch of the syllabus:

"A superintendent of public schools appointed by a board of education under Rev. Stat. 3982, is an employee of the board, and not a public officer within the purview of the constitution forbidding a change in the salary of public officers during their term of office."

and further held as set out in the fourth branch of the syllabus:

"A superintendent of public schools appointed for a certain term at a fixed salary, whose salary was increased during such term for meritorious services, there being no revision of the original contract, no new or additional service to be rendered, or other consideration moving in support of the increase, although entitled to retain such part of the additional salary paid, cannot recover for any portion thereof remaining unpaid."

In view of the foregoing, I would be reluctant to hold that a city superintendent of schools is an officer within the meaning of Section 20, Article II of the Constitution. However, it is believed unnecessary to decide that point. Of course, if he should

be held to be such an officer, it is clear that his salary cannot be increased without violating the provisions of the constitution.

Consideration will be given at this time to the case of *Lynch* vs. *Board of Education,* 116 O. S. 361, to which you refer in your communication.

In this case the salary of the city superintendent of schools was increased during his term. A finding was made by your bureau for the increase which was paid to such superintendent. An action was instituted upon such finding to recover the sum so paid from the superintendent. The Common Pleas Court sustained the contention of the defendant and held said increase to be legal. A judgment was entered in said case without the approval of the Attorney General as required under Section 286, General Code. An action was instituted to vacate such judgment for the reason that no approval of the Attorney General was had at the time it was entered. The Court of Common Pleas overruled that motion. The cause was then carried to the Court of Appeals upon the question of the lower court's ruling upon the motion. The Court of Appeals, as suggested in your communication, reversed the lower court but did not consider the merits of the case as to whether or not as a matter of law the salary could be increased. In other words, the Court of Appeals simply reversed the lower court upon its ruling to the effect that the judgment could not be vacated. The case was then carried to the Supreme Court, which court also considered the question as to the validity of the lower court's ruling upon the motion to vacate the judgment but did not pass in any wise upon the merits of the case. In fact the Supreme Court in its opinion expressly states:

> "This error proceeding being prosecuted from the overruling of a motion to vacate the judgment, the entire record is not before us, and we therefore express no opinion as to whether or not, under the provisions of Section 20, Article II of the Constitution, Lynch was such an official that his salary could not be increased during his existing term of employment."

It will therefore be seen that the only court ruling we have to substantiate the contention that the salary of a city superintendent of schools may be increased during the term for which he was appointed is that of a Common Pleas Court. As hereinbefore indicated, it is believed that when the Legislature prescribed that the board of education should appoint a city superintendent of schools for a definite term, and fix his salary, it did not intend that such board of education was to take further action in connection with said matter. In other words, it is believed that the principle announced in the Cook case, supra, is to the effect that the power to fix a salary for a definite term does not carry with it the power to unfix that salary. Furthermore, it is believed that the statute which provides for the employment of teachers and which expressly authorizes boards of education to increase the salary during their terms is somewhat indicative of the legislative intent that such increases are not to be undertaken except in those instances wherein it was expressly so provided.

In the Lynch case, supra, no exceptions were taken to the ruling of the court and therefore it was impossible to raise the question as to the merits of the case either in the Court of Appeals or in the Supreme Court. While the decision of the lower court to the effect that such increase could properly be made must be recognized as the law in that particular case, in view of what has been said I do not feel that the conclusion therein reached should be adopted as a precedent controlling the future action by your bureau.

Accordingly, it is my opinion that a board of education of a city school district may not lawfully increase the salary of the superintendent during the term for which he was appointed.

Respectfully,
GILBERT BETTMAN,
Attorney General.