

OPINION NO. 80-048

Syllabus:

1. A district advisory council of a general health district may enter into a new contract with member cities in order to change the terms of office of its members.
2. A board of health member whose term of office is altered by contract may not receive an increase in compensation until the member has served out the number of years remaining in the term of office to which such member was appointed under the prior contract.

To: Richard B. Hauser, Huron County Pros. Atty., Norwalk, Ohio
By: William J. Brown, Attorney General, September 5, 1980

I am in receipt of your letter of April 7, 1980, in which you request my opinion with regard to the following four questions:

1. Can the District Advisory Council of a General Health District enter into a new contract with the member cities and thereby change the term of office for Health Board members from seven years to five years?
2. If not, what is the proper procedure, for changing the length of the term of office of Health Board members?
3. Are the members of the Health Board elected under the new contract permitted to receive the increased compensation provided by Ohio Revised Code Section 3709.02 as amended by House Bill No. 1009, effective March 8, 1979, even though they had served on the Health Board under the previous contract?
4. Would such compensation violate Article II, Section 20 of the Ohio Constitution?

In order to properly discuss the issues raised by your letter, I believe it is first necessary to set out the facts pertinent to your request. In 1962, the cities of Willard and Norwalk entered into a contract with the district advisory council of the Huron general health district. This contract was formed pursuant to R.C. 3709.07, which provides for the union of one or more city health districts with a general health district. At that time the contracting parties agreed that the administration of the new combined health district would be taken over by a board of health consisting of seven members who were to be appointed as follows: one member from the city of Norwalk (serving a five-year term), one member from the city of Willard (serving a four-year term) and five members from the townships and villages of Huron County (serving one, two, three, six and seven-year terms respectively). Successors to these board members would be appointed for seven-year terms.

In 1979, while operating under the 1962 agreement, the Huron board of health was advised by Mr. Robert Wolford of the Ohio Department of Health that the terms of office of its members should be changed from seven years to five years. In response to this advice, the cities of Norwalk and Willard and the Huron county general health district replaced the 1962 contract with a new contract in March of 1980. As was true of the prior agreement, this contract provided for a seven-member board. Those members serving under the prior agreement were reappointed under the new agreement but, in each case, for a term of a different length than the remainder of the term left to serve under the prior agreement.

Effective March 8, 1979, the General Assembly enacted R.C. 3709.02, which increased the compensation of health board members from "six dollars per day and mileage at the rate of eight cents a mile to and from the place of meeting to cover the actual and necessary expenses incurred during his attendance upon any meeting of the board not exceeding twelve meetings in any one year" to "twenty dollars a day and mileage at the rate of fifteen cents a mile to and from the place of meeting. . .at any meeting of the board and not exceeding five meetings of board committees in any one year." The health board members of Huron County have asked whether their new contract entitles them to the increase in compensation enacted by the General Assembly.

With regard to your first question, R.C. 3709.07 expressly grants to the city and county health districts the power to enter into a contract to form a combined health district. When the administration of the district is to be handled by a combined health board, as is the case in Huron County, R.C. 3709.07 provides that the contract shall state the "number of members of such board, their terms in

office, and the manner of appointment." In an ordinary contract, involving individuals, the parties may mutually agree to change their contractual obligations. I can find no authority for the proposition that entities such as health districts should be viewed any differently than individuals in this respect. Therefore, it is my opinion that the health district and the cities of Norwalk and Willard were authorized to enter into a new contract to change the term of office for health board members from seven years to five years.

Because I have concluded that a contract may be used to change the term of office of health board members, I find it unnecessary to answer question two.

The answer to question three necessarily depends on the outcome with regard to question four. Ohio Const. art. II, §20, to which these questions relate, prohibits the change in salary of a public officer during his existing term of office. If the receipt of the increase in compensation would violate Ohio Const. art. II, §20, the health board members will, of course, not be permitted to receive the increase. In like manner, if the increase in compensation is not in violation of art. II, §20, the health board members may receive the increase. In 1979 Op. Att'y Gen. No. 79-102, I concluded that members of a board of health of a general health district are public officers within the meaning of art. II, §20 and, therefore, may not receive an increase in compensation during their current terms in office. The Huron health district is a combined rather than a general health district and the terms of office of its members are set by contract rather than by statute. However, R.C. 3709.07 specifically states that a board of health of a combined health district "shall have, within the combined district, all the powers granted to, and perform all the duties required of, the board of health of a general health district." In determining whether a position is a public office "[t]he chief and most decisive characteristic. . . is. . . the quality of the duties with which the appointee is invested." State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N.E. 919 (1917). The duties and powers of a member of a combined board of health are identical to those of a member of a general board of health. Therefore, my conclusion in Op. 79-102 that the duties and powers of a member of a general health district are such as to make him or her a public officer leads directly to the conclusion that a member of a combined general health district is also a public officer.

Because I have found the health board members to be public officers, the key inquiry becomes whether the 1980 contract results in new terms of office for health board members or whether it merely results in a continuation of their prior terms. Clearly, any member who was not serving out a term under the prior contract, but was newly appointed under the 1980 contract, is entitled to the higher rate of compensation. For members whose terms under the prior contract had not expired, the analysis is not so simple. One fact which cannot be ignored is the similarity between the number of years each member had remaining in his original term and the number of years which the "new" term of office grants him. It is my understanding that, in each case, the individual member now has one year less to serve than the number of years which remained in his original term. The 1980 contract did not differ in any significant respect from the 1962 contract, other than to change the terms of office of health board members. Thus, it serves, in effect, as a continuation of the prior agreement, on all matters except the length of the terms of office of members. In addition, the primary motivation for the new contract was the suggestion of Mr. Wolford that terms of office should be less than seven years. A consideration of all of these factors leads to the conclusion that the board members are, in actuality, not beginning new terms. Rather, they are continuing to serve out their old terms in office, albeit, what are now slightly shortened terms. As a result, any increase in compensation would be an increase enacted during the term in office which was in existence at the time when the increase was adopted, and would not be permitted under Ohio Const. art. II, §20.

I do not mean to suggest that the health board members are illegally attempting to thwart the constitutional prohibition against increases in compensation during their terms in office. However, one must confront the realities of the situation and, as in many other areas of the law, substance must

triumph over form. In City of Parma Heights v. Schroeder, 26 Ohio Op. 2d 119, 196 N.E. 2d 813 (1963), the court faced a situation similar to the one presented in your letter. In that case, the Parma Heights city council voted an increase in salary for council members. Under art. II, §20, council members already serving terms in office were ineligible to receive the increase. Several council members resigned their positions, were immediately reappointed to city council to fill the vacancies which their resignations had created, and attempted to receive the higher rate of compensation. In finding these council members ineligible for the increased salary, the court stated that "one cannot do indirectly what one cannot lawfully do directly." 26 Ohio Op. 2d at 122, 196 N.E. 2d at 816.

Under the analysis applied in the Schroeder case, the health board members who still have years remaining in their terms under the former contract may not be permitted to receive an increase in compensation during those years due to the fact that such increase would violate art. II, §20. Should any member currently on the board serve out the number of years which remained in his or her term under the previous contract, that individual would then become eligible for the higher rate of compensation during any subsequent years.

It is, therefore, my opinion, and you are advised, that:

1. A district advisory council of a general health district may enter into a new contract with member cities in order to change the terms of office of its members.
2. A board of health member whose term of office is altered by contract may not receive an increase in compensation until the member has served out the number of years remaining in the term of office to which such member was appointed under the prior contract.