

OPINION NO. 73-131

Syllabus:

A member of the Environmental Board of Review is a public officer within the meaning of Article II, Section 20 of the Ohio Constitution, and such officer did not receive a pay raise under Am. Sub. S.B. 31 if his term began before enactment of the bill.

**To: Earl Finbar Murphy, Chairman, Environmental Protection Board of Review,
Columbus, Ohio**
By: William J. Brown, Attorney General, December 18, 1973

Your request for my opinion states the facts and poses the following questions:

"On July 27, 1973, the General Assembly passed Sub. S.B. 31, signed by the Governor on August 1, 1973, which granted to employees of the state a pay raise of 25 cents per hour or 5%, whichever was greater. As members of the Environmental Board of Review we have been receiving this increase in our pay since August 1, 1973.

"The Constitution of the State of Ohio provides in Article II, Section 20:

"The General Assembly, in cases now 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."

"The Board hereby request a formal opinion of the Attorney General as to the following issues:

"1. Whether or not members of the Environmental Board of Review are public officers within the meaning of Article II, Section 20 of the Ohio Constitution; and

"2. Whether or not the pay raise granted to the Board by Sub. S.B. 31 is constitutional;

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"If you find this enactment to be in violation of the Constitution, please inform the Board of the procedures necessary for them to reimburse the General Fund of the State of Ohio. * * *"

Article II, Section 20, prohibits any change in the salary of a public officer during his term. A public official, as distinguished from a public employee, is one whose duties involve the exercise of continuing, independent, political or governmental functions. In State ex rel. Herbert v. Ferguson, 142 Ohio St. 496, 501, the Court said:

"A 'civil office' or a public office of a civil nature, as defined by the Ohio cases, is a charge or trust conferred by public authority for a public purpose with independent and continuing duties, involving in their performance the exercise of some portion of the sovereign power. * * *"

In this case, the board members have many indicia of public officials--durability of tenure, salary, and appointment by the governor. More importantly, R.C. 3745.04 and 3745.05 give the board power to review decisions of the Director of Environmental Protection. This exercise of independent quasi-judicial power is, of course, an exercise of the sovereignty of the state. See State, ex rel. Landis v. County Commissioners, 95 Ohio St. 157 (1917); State, ex rel. Mikus v. Roberts, 150 Ohio St. 2d 253 (1968); Opinion No. 73-104, Opinions of the Attorney General for 1973; Opinion No. 72-054, Opinions of the Attorney General for 1972.

Under this test I have no doubt that the members of the Environmental Board of Review are public officials within the meaning of Article II, Section 20.

Your second question assumes that Am. Sub. S.B. No. 31 granted a pay raise to the Board, and asks whether this is constitutional. I must disagree with your assumption that the bill granted a raise to the board. It will be observed that the classification, "Member, Environmental Board of Review," in the amended R.C. 143.09, is followed by the symbol (S). This symbol is explained in R.C. 143.10(J) as follows:

"* * *An officer * * *serving in a classification designed by a letter (S) in division (A) of Section 143.09 of the Revised Code shall be paid at the rate established for step one of the range and shall not receive step advancements.
* * * (Emphasis added.)"

This was a clear recognition by the General Assembly that the members of the Board, being state officers, could not receive a raise in pay during their terms. Furthermore, in establishing the new pay rates by amendment of R.S. 143.10(A), Am. Sub. S.B. 31 speaks only of "employees." The conclusion must be that the General Assembly did not intend the members of the Board to receive the raise. A statute must, of course, be so interpreted as to save it from constitutional infirmities wherever possible. Wilson v. Kennedy, 151 Ohio St. 485, 492 (1949); State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 277 (1942).

R.C. Chapter 115 explains the procedures that should be followed in reimbursing the General Fund of the state. R.C. 115.17 states that the officer, in this case the chairman of the board, should report the existence of the salary claim to the auditor. After determining the amount owed, the board members should prepare a statement for the state auditor showing the liability on account of which the board members desire to repay the state. R.C. 115.24. Such statement need not include a copy of all pay vouchers because the auditor has the means of determining this information. After providing this statement to the auditor, the board members may then draw a certified check payable to the order of the state treasurer. Certification of the check will alleviate the problem that such draft is not considered payment until honored by the drawee. Cf. Opinion No. 923, Opinions of the Attorney General for 1951. The officers may then demand a receipt for such payments. R.C. 115.25. The auditor will tell the state treasurer what fund is to be credited with this amount.

If all the proceeding steps are followed, then the public officers will be discharged of all liability to the state.

In specific answer to your questions, it is my opinion and you are so advised that a member of the Environmental Board of Review is a public officer within the meaning of Article II, Section 20 of the Ohio Constitution, and that such officer did not receive a pay raise under Am. Sub. S.B. 31 if his term began before enactment of the bill.