

**OPINION NO. 77-083**

**Syllabus:**

1. Ohio Const. art. II, §20, prohibits any increase in per diem payments to a township trustee that results from legislative action taken during such trustee's existing term in office.
2. Pursuant to R.C. 505.24, a township trustee is permitted to receive an increase in per diem compensation as the township budget increases,

provided that his existing term in office commenced after the effective date of the most recent amendment of that statute.

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To: Anthony Pizza, Lucas County Pros. Atty., Toledo, Ohio  
By: William J. Brown, Attorney General, December 1, 1977

I have before me your request for an opinion concerning the compensation of township trustees. Specifically, you have raised the following questions:

1. Does State ex rel. Artmayer vs. Board of Trustees of Delhi Township, 43 Ohio St.2d 62, 12 O. Ops.2d 35 (1975), apply the constitutional prohibition against in-term salary increases to both township trustee's per diem payments and township clerk's compensation or only to the township clerk's compensation?
2. Does the increase in maximum compensation or per diem which would result from an increase in the township's budget thereby placing it into a larger class constitute a salary increase prohibited by Article II §20 of the Ohio Constitution?

Ohio Const., art. II, §20 provides 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.

The case that you cite in your first question, Artmayer v. Delhi Township, 43 Ohio St.2d 62 (1975) broadly construes the prohibition set forth in art. II, §20, supra. The plaintiff held the office of a township clerk. After he had assumed that office, the General Assembly amended R.C. 507.09 to increase the remuneration of township clerks. Subsection (C) of the amended statute provides as follows:

(C) In townships having a budget of five thousand dollars or over, the clerk shall receive three percent of the total expenditures of such township in excess of five thousand in addition to the amount provided under division (B) of this section. No township clerk shall receive compensation in excess of the following amounts in any one calendar year for said services as such clerk:

- (1) In townships having a budget of from five thousand to two hundred thousand dollars, four thousand two hundred fifty dollars;
- (2) In townships having a budget of from two hundred thousand to three hundred fifty thousand dollars, five thousand two hundred fifty dollars;
- (3) In townships having a budget of three hundred fifty thousand dollars or over, six thousand two hundred fifty dollars.

The plaintiff argued that since R.C. 507.09 (C) used the term "compensation" instead of "salary", art. II, §20, supra, did not apply and that he was, therefore, entitled to receive the higher rate of remuneration. The Supreme Court disagreed. The syllabus contained the following language:

The terms of "salary" and "compensation", as used in Section 20, Article II of the Ohio Constitution, are synonymous.

Your first question is whether the holding of Artemayer v. Delhi Township, supra, applies to township trustees as well as township clerks. The answer depends upon whether township trustees are "officers" within the meaning of art. II, §20, supra. In State, ex rel. Milburn, v. Pethel, 153 Ohio St. 1, 5 (1950), the Supreme Court established the following test to distinguish officers from employees:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary . . . The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

It is clear that township trustees qualify as officers under the foregoing test. Township trustees are elected for a definite term of office. R.C. 505.01. They are required to post a bond. R.C. 505.02. The board of township trustees is the taxing authority of the township and, as such, exercises a continuing governmental function. Township trustees are, therefore, "officers" covered by art. II, §20, supra.

Since township trustees are officers, they are not permitted to receive any increase in salary or compensation that results from legislation enacted during their existing term in office. The prohibition obviously applies with equal force to annual salaries and per diem compensation.

Your second question raises a related issue. As you indicate, the per diem compensation of township trustees, as set forth in R.C. 505.24, is based upon the budget of the township. As the township's budget increases, so does the per diem compensation of the township's trustees. Although it might be argued that the decision in Artemayer, supra, precludes any possibility of an increase in compensation in-term, the Supreme Court has established certain rules that permit in-term pay increases for officers despite the prohibition set forth in art. II, §20, supra. Further analysis is therefore required to determine whether these "exceptions" apply to R.C. 505.24, and thus allow increases in per diem compensation during a trustee's term in office.

In State, ex rel. v. Raine, 49 Ohio St. 580 (1892) the Supreme Court was confronted with a statute which based the allowable salary for county commissioners upon the population of their county. Action was brought to test the constitutionality of the statute. The commissioners in question were elected prior to the enactment of the statute, and received an in-term increase in salary when the census revealed a population increase. The syllabus of that opinion contained the following language:

A statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a

public office, contravenes section 20, of article II, of the Constitution of this state, insofar as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted. (Emphasis added)

Thus, the constitutional prohibition applies to legislative enactments that seek to increase salaries of officers already in office. The prohibition does not, however, apply to in-term increases that are based upon a set formula outside the control of the legislature provided that the formula is established prior to the time the officer commences his term.

This rule was specifically established by the Supreme Court in State, ex rel., Mack v. Guckenberger, 139 Ohio St. 273 (1942). This case did not involve art. II, §20, supra, but Ohio Const. art. IV, §14. The latter provision, which has since been repealed, prohibited in-term changes in salaries for judges. The statute there in question also based the judge's salary upon the population of the county in which he sat. Unlike the situation in State, ex rel. v. Raine, supra, the statute in question was already in effect at the time the judge was elected. In the middle of his term, the census revealed an increase of population which would have entitled the judge to a higher rate of compensation. The Supreme Court held for the judge, and reasoned as follows:

The inhibition found in Section 14, Article IV of the Constitution, to the effect that the compensation of common pleas judges "as may be provided by law," that is, by the Legislature, "shall not be diminished, or increased, during their term in office," is directed to the Legislature and not to the officer who pays the compensation to the judge who receives it. The inhibition, according to the language of the Constitution thus directed to the Legislature, is that it shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary in an amount as time advances, provided that basis, within the contemplation and understanding of both the judge and the people who elect him, is fixed, certain and unchangeable during his term . . . Guckenberger, supra, at 282-283.

The rationale set forth in Guckenberger, supra, clearly indicates that a salary increase based upon an increase in the township budget is constitutionally permissible. Accord, State, ex rel, Edgecomb v. Rosen, 29 Ohio St.2d 114 (1972). The situations in Guckenberger, supra, and Raine, supra, are however distinguishable from the one you describe. In both of those cases, the sliding scale established by the General Assembly was based upon population. Clearly, the officials had no control over the population of their counties. In R.C. 505.24, however, the compensation is based upon the budget of the township, and the board of township trustees would have a significant impact upon the size of that budget, since R.C. 5105.01 makes them the taxing authority for the township. Whether this distinction is sufficient to change the result requires further analysis.

In 1955 Op. Att'y Gen. No. 5199, p. 231, my predecessor had occasion to consider a similar question. That Opinion dealt with county boards of election and art. II, §20, supra. Under the provisions of R.C. Chapters 3501 and 3503, then in force, the compensation of members on the county board of election was based in part upon the population of "registration precincts." The board, however, had some discretion in establishing such precincts, and net effect was that the board could

increase its own compensation by acting in a certain way. The syllabus of that opinion provides in part, as follows:

A member of the board of elections may not lawfully receive an increase in compensation during his existing term where such increase consists of the additional compensation provided in section 3501.12, Revised Code, on the basis of population in the total area comprising registration precincts therein, and where the registration requirement in such area is established by discretionary action of the board concerned . . .

The opinion was supported by a simple rationale. By allowing the boards of election to establish registration districts at their discretion, the General Assembly had effectively delegated its salary making authority to the board itself. Such a delegation was clearly prohibited by art. II, §20, supra, particularly where there was no way in which the board's discretion to act could be held in check.

It is certainly arguable that a broad application of the foregoing conclusion would compel an affirmative answer to your second question. Although it is true that the board of township trustees is, under R.C. 5705.11, the taxing authority of the township and therefore capable of increasing its township's budget, several factors distinguish its control over the budget from the control of the board of elections over "registration precincts" described in Opinion No. 5199, supra. First, a very likely source of any budget increase would be an increase in the assessed value of the property within the township, and that could result in any number of factors wholly outside of the control of the trustees. Second, any tax increase above of the ten mill limitation would require approval of the voters, and that too is beyond the direct control of the trustees. R.C. 5075.02. I am of the opinion, therefore, that the factors affecting township budgets are sufficiently independent of the township trustees to prevent R.C. 505.24 from constituting a delegation of salary making powers from the General Assembly to the trustees.

Accordingly, it is my opinion, and you are so advised that:

1. Ohio Const. art. II, §20, prohibits an increase in per diem payments to a township trustee that results from legislative action taken during such trustee's existing term in office.
2. Pursuant to R.C. 505.24, a township trustee is permitted to receive an increase in per diem compensation as the township budget increases, provided that his existing term in office commenced after the effective date of the most recent amendment of that statute.