

OPINION NO. 80-050**Syllabus:**

1. Members of the board of education of an exempted school district are "public officers" as that term is used in Ohio Const. art. II, §20, and, therefore, may not receive an increase in compensation during their existing terms of office.
2. A board of education may vote to increase the compensation of its members to the maximum permitted by R.C. 3313.12, but, pursuant to Ohio Const. art. II, §20, any such increase in compensation may not become effective with respect to a particular board member during that member's existing term of office.

To: David E. Lightliser, Licking County Pros. Atty., Newark, Ohio

By: William J. Brown, Attorney General, September 5, 1980

I am in receipt of your letter of March 20, 1980, in which you request my opinion on whether members of the Board of Education of the Granville Exempted School District may receive an increase in compensation during their term in office.

As I understand the facts presented by your letter and clarified by a telephone conversation, the Granville Board of Education consists of five members, all of whom were elected for terms beginning on or before January 1, 1980. Prior to January 1, 1980, the Board, by resolution, established the compensation of its members at \$10 per regular meeting attended, not to exceed twelve meetings per year. The Board of Education would like to pass a resolution which would increase the compensation of its members from \$10 to \$12 per regular meeting attended, not to exceed twelve meetings per year. The board claims the authority to take such action pursuant to R.C. 3313.12, which reads in pertinent part:

The board of any school district other than a county school district may provide by resolution for compensation of its members, provided that any such compensation shall be paid out of current operating funds derived from a local tax which is in excess of the tax levy required for participation in additional aid from the state public school fund and that such compensation shall not exceed forty dollars per member for meetings attended not exceeding twelve meetings in any one year. (Emphasis added.)

Any effort by a public officer to receive an increase in salary during the term of office is governed by Ohio Const. art. II, §20, which reads:

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.

This section of the Ohio Constitution is aimed at avoiding the situation in which an officer attempts, due to the influence of his office, to gain an increase in salary at the expense of the public, and the situation in which the legislature seeks to reduce an officer's compensation after his term begins. State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 278, 39 N.E. 2d 840, 843 (1942).

Attorney General opinions issued by my predecessors allowed per diem increases in term based on a distinction between the words "salary" and "compensation." See, e.g., 1960 Op. Att'y Gen. No. 1115; 1951 Op. Att'y Gen. No. 978, p. 825. Since the issuance of those opinions, the Ohio Supreme Court has held that, for the purposes of art. II, §20, the terms "salary" and "compensation" are

synonymous. State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E. 2d 692 (1976); State ex rel. Artmayer v. Board of Trustees, 43 Ohio St. 2d 62, 330 N.E. 2d 684 (1975). As a result, the question whether per diem increases are permissible must now be determined on the basis of the traditional art. II, §20 analysis. See 1979 Op. Att'y Gen. No. 79-102. See generally 1980 Op. Att'y Gen. No. 80-002.

The first step in any art. II, §20 analysis of in-term compensation increases is to determine whether the position involved is that of a public office. The elements of a public office are clearly set out in State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N.E. 919 (1917). The court in that case stated:

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 no longer an open question in this state that "to constitute a public office, . . . it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law."

An oath of office is required of a board of education member by R.C. 3313.10, which refers to the position as an "office." In addition, the official duties of the board are prescribed by various statutes in R.C. Chapter 3313, and the performance of these duties as an overseer of public education involves a governmental function. See Brown v. Board of Education, 17 Ohio App. 2d 1, 243 N.E. 2d 767 (1969). It is my opinion that the position of a member of a board of education is clearly a public office and, therefore, subject to the limitations concerning changes in compensation which are set forth in art. II, §20.

Having determined that the restrictions of art. II, §20 apply to members of a board of education, it becomes necessary to decide whether an increase in compensation would actually occur in the situation presented by your request. The test used by the Ohio Supreme Court is whether the number of dollars paid to the public officer increases. Artmayer, 43 Ohio St. at 65, 330 N.E. 2d at 686; 1978 Op. Att'y Gen. No. 78-018. In the situation you pose, in which the board will by resolution set a higher rate of compensation, there will obviously be an increase in the number of dollars to be paid. Since there will be an increase in monetary compensation, this situation is within the purview of art. II, §20. See, e.g., Op. No. 79-012 (an increase in a per diem allowance for attendance at a meeting of a board of health constitutes an increase in compensation for purposes of Ohio Const. art. II, §20).

Should the legislature, by statute, increase the compensation of school board members, the increase would clearly not be allowed for current officeholders during their existing terms. See Op. No. 79-012 (concerning members of a board of health). It is necessary to determine whether the same holds true when it is a board of education rather than the legislature which is initiating the increase. The state legislature has the authority to set the salaries of public officers under art. II, §20. In the enactment of R.C. 3313.12, the legislature has delegated some of this authority to the board of education. Delegation of authority by the General Assembly has been approved where adequate guidelines are provided. See generally In re Adoption of Uniform Rules & Regulations Relating to Valuation of Real Property, 169 Ohio St. 445, 160 N.E. 2d 275 (1959). Even if there were some

question as to the constitutionality of such a delegation of legislative power, however, "It is inappropriate for this office to determine the constitutionality of state statutes." 1976 Op. Att'y Gen. No. 76-021 at 2-66. Assuming, therefore, that R.C. 3313.12 is constitutional, it remains true that the General Assembly may not delegate more power than it possesses. The board of education is bound by the same constitutional limitations as the state legislature. See City of Columbus v. Public Utilities Commission, 103 Ohio St. 79, 133 N.E. 800 (1921) (concurring opinion, Wanamaker, J.).

When it becomes apparent that the board of education is merely acting in the stead of the General Assembly, the analysis becomes much more certain. The legislature may not constitutionally grant an increase in term to the members of the board. Therefore, the board is also barred from taking such action. This does not mean that the board may not vote in favor of a resolution increasing the salary of its members. This action may certainly be taken, so long as no person currently in office receives the benefit of the increase during such person's existing term.

In 1978 Op. Att'y Gen. No. 78-054 and Op. No. 80-002, I stated that the failure of a township trustee to accept insurance coverage available to him at the beginning of his term did not bar him from accepting coverage at a later date. The later acceptance was not considered an increase in compensation. There is an argument that this analysis should also apply in the current situation. Because the legislature had set a limit of \$40 per meeting in R.C. 3313.12, it can be argued that the members were entitled to that amount when they took office and that their failure to grant themselves the total amount should not bar them from later choosing to accept the maximum. This argument fails, however, to distinguish between compensation as a matter of right and compensation conditioned on a prior resolution. In the situation outlined above, the township trustee, when he accepted office, had a right to be furnished with insurance coverage. It was already an element of the compensation of trustees. In contrast, the board of education members, at the time they took office, were entitled only to what the board had previously set as their rate of compensation. They did not possess any right to the maximum of \$40. Instead, they possessed the authority to legislate regarding compensation in the same manner that the General Assembly legislates. The right of any board of education member to the \$40 maximum is conditioned on approval of that amount by the board prior to such member's term in office. In the situation you present, the previous board had set the compensation of the individual members at \$10 per meeting and, therefore, no right to compensation in excess of that amount came into existence prior to the beginning of existing terms of office.

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

1. Members of the board of education of an exempted school district are "public officers" as that term is used in Ohio Const. art. II, §20, and, therefore, may not receive an increase in compensation during their existing terms of office.
2. A board of education may vote to increase the compensation of its members to the maximum permitted by R.C. 3313.12, but, pursuant to Ohio Const. art. II, §20, any such increase in compensation may not become effective with respect to a particular board member during that member's existing term of office.