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1. TERMS "COMPENSATION" AND "SALARY" NOT SYNONYMOUS—USED IN ARTICLE II, SECTION 20, CONSTITUTION OF OHIO—OPINION 749, O. A. G. 1939, PAGE 947, APPROVED AND FOLLOWED.

2. LEGISLATURE MAY CHANGE PER DIEM COMPENSATION OF ANY OFFICER WHOSE TOTAL COMPENSATION IS BASED UPON PER DIEM PAYMENT—NO SALARY RECEIVED IN SENSE OF ANNUAL OR PERIODICAL PAYMENT FOR SERVICES—DEPENDENT UPON TIME, NOT UPON AMOUNT OF SERVICE—OPINION 387, O. A. G. 1945, PAGE 473, DISTINGUISHED.

3. MEMBERS OF OHIO STATE DENTAL BOARD ENTITLED TO RECEIVE $15.00 FOR EACH DAY ACTUALLY EMPLOYED IN DISCHARGE OF OFFICIAL DUTIES—SECTION 1317, G. C., AMENDED SENATE BILL 365, 99 GENERAL ASSEMBLY, EFFECTIVE SEPTEMBER 18, 1951.

SYLLABUS:

1. The terms "compensation" and "salary," as used in Article II, Section 20 of the Constitution of Ohio, are not synonymous. (Opinion No. 749, Opinions of the Attorney General for 1939, page 947, approved and followed.)

2. Under the provisions of Article II, Section 20 of the Constitution of Ohio, the Legislature may change the per diem compensation of any officer whose total compensation is based upon such per diem payment and who receives no "salary" in the sense of an annual or periodical payment for services dependent upon the time and not on the amount of service rendered. (Opinion No. 387, Opinions of the Attorney General for 1945, page 473, distinguished.)

3. Under the provisions of Section 1317, General Code, as amended by Amended Senate Bill No. 365, 99 General Assembly, effective September 18, 1951, members of the Ohio State Dental Board are entitled to receive $15.00 for each day actually employed in the discharge of official duties after the effective date of such amendment.

Columbus, Ohio, December 4, 1951

Ohio State Dental Board
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

> "On June 1, 1951 the General Assembly enacted Amended Senate Bill #365 which was an act to amend certain sections of the General Code relative to the salaries and per diems of certain State officials and Board Members.
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> "Included in this act was an amendment to Section 1317, General Code, to provide that each member of the State Dental Board shall receive $15 for each day actually employed in the discharge of his official duty. The per diem prior to the enactment of this legislation was $10.
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> "The question before us and on which we desire your opinion is whether the present members of the Dental Board are entitled to this increased per diem rate for the balance of the term each now is serving."

By the provisions of Section 1314, General Code, members of the State Dental Board are appointed for terms of five years.

As you state, the per diem compensation of members of your Board, as fixed by Section 1317, General Code, was formerly ten dollars. As amended by Amended Senate Bill No. 365, 99 General Assembly, effective September 18, 1951, that section reads as follows:

> "Each member of the state dental board shall receive fifteen dollars for each day actually employed in the discharge of his official duties, and his necessary expenses incurred. The secretary shall receive his necessary expenses incurred in the discharge of his official duties. The compensation and expenses of the secretary and members, and the expenses of the board, shall be paid from the fund in the state treasury for the use of the board on the requisition signed by the president and the secretary of the board and the warrant of the auditor of state."

The only change made, so far as the members of the Board are concerned, is the substitution of the word "fifteen" for "ten."

The Constitution of Ohio in Article II, Section 20, makes this provision:

> "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."
> (Emphasis added.)

In State, ex rel. McNamara v. Campbell, 94 Ohio St., 403, it was held that the word "officers," as used in Article II, Section 20 of the Constitution, includes appointive as well as elective officers. Thus, there appears to be no question as to the fact that members of the State Dental Board are "officers" within the meaning of such constitutional provision.

The fundamental question involved in your request is whether the change in the per diem compensation of such members during their existing terms may be said to "affect the salary" of such officers within the purview of such constitutional provision.

The answer to this question, of course, involves a consideration of the meaning of "salary" as so employed. Obviously, the per diem of the members of the State Dental Board is "compensation." Furthermore, it would clearly appear that all "salary" is "compensation." Is such per diem "compensation" considered "salary" within the meaning of the Constitution? Upon the answer to this question must depend the solution to your inquiry.

The question of whether the terms "compensation" and "salary," as used in Article II, Section 20 of the Constitution are or are not synonymous, or may or may not be used interchangeably, has been considered on several different occasions by my predecessors in office and the conclusions reached have not been uniform. Likewise, this question has also been considered directly and indirectly by the courts in various cases and again the conclusions reached do not appear to be uniform.

After careful consideration of all of such cases and prior opinions, together with an examination of the debates and proceedings of the Ohio Constitutional Convention of 1850-1851, I am of the opinion that the terms "compensation" and "salary," as used in Article II, Section 20 of the Constitution of Ohio were not intended by the framers thereof to be synonymous or to be used interchangeably. In view of the apparent lack

of uniformity in prior holdings of this office and, to some extent, by the courts, I believe that it would be advisable to review somewhat at length these prior holdings.

Before doing so, however, I should point out, for purposes of comparison, the language of other constitutional provisions prohibiting an increase in compensation during an existing term of office. All of these provisions were adopted as a part of the original Constitution of 1851.

Article II, Section 31, provides:

> "The members and officers of the General Assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in payment of postage or otherwise; and no change in their compensation shall take effect during their term of office."

Article III, Section 19, with reference to the offices of Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State and Attorney General, provides:

> "The officers mentioned in this article shall, at stated times, receive, for their services, a compensation to be established by law, which shall neither be increased nor diminished during the period for which they shall have been elected."

Article IV, Section 14, reads as follows:

> "The Judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this State, given by the General Assembly, or the people, shall be void."

It will be noted that Article II, Section 20 is the only one of such constitutional provisions employing the term "salary." Whether this fact is indicative of a constitutional intent to differentiate the terms of Article II, Section 20 from the terms of these other constitutional provisions, or whether, as stated in Opinion No. 387, Opinions of the Attorney General for 1945, page 473, at page 484, "* * * it is inconceivable that the framers of the Constitution intended to establish one rule for one or more classes

of public officers and another rule for the remainder", appears to be the crux of the question here involved.

Subsequent to the adoption of the Constitution of 1851, this question was first considered by the Supreme Court of Ohio in the case of Thompson v. Phillips, 12 Ohio St., 617 (1861.) At that time the compensation of county treasurers was based entirely upon a fee schedule. The Legislature, during the term of the Franklin County Treasurer, had amended such fee schedule which, in effect, reduced his compensation by way of fees approximately $400. The treasurer claimed that he was not affected by the amendment of the law, relying on Article II, Section 20 of the Constitution, and sought a writ of mandamus to compel the payment of the compensation claimed due. The court refused the writ and, after quoting Article II, Section 20 of the Constitution, said:

> "It is manifest, from the change of expression in the two clauses of the section, that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time, and not on the amount of the service rendered."

The case of State, ex rel. v. Raine, Auditor, 49 Ohio St., 580, 1892, involved a consideration of the constitutionality of an act providing as to each commissioner of Hamilton County the sum of $1,000 per annum "for expenses incurred by said commissioner, in the proper discharge of his duties within said county." While conceding that the statute, by its terms, did not use the word "salary," the court pointed out that the county comissioners of Hamilton County, before the adoption of this statute, were each entitled to $2,000 per annum, plus necessary traveling expenses when traveling outside the county on official business and concluded that the statute was unconstitutional. The syllabus of this case reads as follows:

> "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, in so far as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted."

The case of Gobrecht v. Cincinnati, 51 Ohio St., 68, 1894, appears to be indistinguishable from the factual situation involved in your request. The first and second branches of the syllabus read:

"1. Compensation of a public officer fixed by a provision that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance,' is not 'salary' within the meaning of section 20, of article 2, of the constitution, which provides that '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.'

"2. An increase in the compensation of such officer during his term is not prohibited by the constitution."

Commenting on the Raine case, supra, the court stated at page 73 of the opinion:

"Nor is this conclusion inconsistent with the holding in *The State ex rel.* v. *Raine,* 49 Ohio St. 580. The act of April 8, 1886, gave to the commissioners of Hamilton county a salary of $2,000 per year each, and necessary traveling expenses when traveling outside the county on official business. The amendment under review undertook to give them, for expenses, $1,000 per annum additional. The holding is that the addition, though in terms for expenses, was in effect an increase of salary, which was unauthorized as applied to the existing term of a commissioner in office when the increase was made."

It should be noted that in the cases of Gobrecht v. Cincinnati and Thompson v. Phillips, the officers in question received nothing which could be termed "salary" in the sense of an annual or periodical payment for services dependent on the time and not on the amount of service rendered. In State, ex rel. v. Raine, on the other hand, the officer in question did receive a definite salary of $2,000 per annum.

Lower court decisions relying upon the cases of Thompson v. Phillips and Gobrecht v. Cincinnati, and holding that compensation and salary are not synonymous, are State, ex rel. Taylor, Auditor v. Madison County, 13 O. D. (N. P.) 97 (1902) and Theobald v. State, ex rel., 10 O. C. C., (N. S.) 175 (1907).

In Opinion No. 565, Opinions of the Attorney General for 1917, Vol. II, page 1614, one of my predecessors was called upon to determine whether Article II, Section 20 of the Constitution prohibited a change in the compensation of certain township officers, such compensation being on a fee basis. I quote from such opinion at page 1617:

> "From the earliest times in this state it has been uniformally held that the word 'salary,' as used in this section, is designedly employed in contra-distinction to the term 'compensation' as used in the same section; that a change of compensation other than salary, to take effect during the existing term of an officer, is not prohibited, and that a salary is compensation dependent upon the lapse of time only, and in nowise dependent upon the amount of official services performed."

In State, ex rel. Lueders v. Beaman, 106 Ohio St., 650 (1922), the Supreme Court held that probate judges were prohibited by Article II, Section 20 of the Constitution from receiving certain fees based upon a determination of inheritance tax proceedings in each case. Three of the members of the court were of the opinion that this constitutional provision prohibited the allowance of such compensation where the act providing such had been passed during the existing term of office without regard to whether new or additional duties were imposed upon such judges, while two of the members of the Court were of the opinion that new and additional duties were not so imposed. The court made no reference to the earlier cases of Thompson v. Phillips and State, ex rel. v. Raine, or Gobrecht v. Cincinnati, supra. Again, however, as in the Raine case, it should be noted that the probate judge at such time did receive a "salary" in the sense of a fixed compensation not dependent upon services rendered. Under the provisions of Section 2992, General Code, his salary was based upon the population of the county.

In State, ex rel. Boyd v. Tracy, 128 Ohio St., 242, 1934, it was held that an act of the 90th General Assembly, making an appropriation for paying the expenses of not to exceed $4.00 per legislative day, incurred by members in attendance at special session of the 90th General Assembly held during 1934, was unconstitutional as being in violation of the provisions of Article II, Section 31 of the Constitution. As previously noted, Article II, Section 31, does not contain the term "salary." However, the opinion of Stephenson, J., at page 253, cited with approval the case of State, ex rel. v. Raine, supra, and stated:

> "This case is cited for the sole and only purpose of showing that the terms 'salary' and 'compensation' do not mean a thing when cases of this character are being considered, the whole question being, 'Can the number of dollars payable to an incumbent of a public office be increased by the enactment of a statute during his term of office?' "

The last Supreme Court case touching upon this question is State, ex rel. DeChant v. Kelser, 133 Ohio St., 429,, 1938. When relator began his term of office, the statutes provided that the annual compensation of each county commissioner should be determined by the aggregate of the tax duplicate for real estate and personal property of a county, with certain minimum and maximum limitations. The General Assembly amended this statute during the term of the relator and provided the compensation of county commissioners should be determined by population, with other provisions as to minimum and maximum not involved in the litigation. The court held that the relator was not entitled to an increase under the terms of Article II, Section 20 of the Constitution. Although it would appear that the compensation of the county commissioner, both before and after the amendment would be "salary" in the sense of a fixed compensation not dependent upon the amount of service rendered, this question was not discussed in the opinion of the court, such opinion reading in part as follows, pages 430, 431:

> "Counsel for relator contends that the words 'compensation' and 'salary' are not synonymous; that the word 'compensation,' and not the word 'salary,' is used by the General Assembly throughout the former Section 3001, General Code; that the remuneration fixed by the Legislature for a public officer may be 'compensation,' 'salary,' or both; that no 'salary' was provided for county commissioners under the former statute for the reason that certainty was wanting due to the fact that the aggregate tax duplicate annually fluctuated, but that under the amended section certainty of computation is provided because remuneration is based upon a definitely ascertainable federal census; and that, therefore, since former Section 3001 provided for 'compensation,' the inhibition contained in Section 20, Article II, does not bar a county commissioner whose term began prior to August 5, 1937, from receiving the 'compensation' provided by amended Section 3001.
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> "Counsel for relator contends that the distinction between 'compensation' and 'salary' is made more manifest by considering that 'the word "salary" appears in no other section of the Ohio Constitution and there must have been some reason for including it in the last member of the compound sentence which comprises said Section 20, instead of repeating the word "compensation."' He cites several nisi prius opinions in support of his distinction between these words.
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> "We direct attention to the provision of Section 7, Article IV of the Constitution, which provides that probate judges 'shall

receive such *compensation,* * * * as shall be provided by law' (italics ours), and to the decision of this court in *State, ex rel. Lueders,, Probate Judge,* v. *Beaman,* 106 Ohio St., 650, 140 N. E., 396, wherein it was held that the inhibition contained in Section 20, Article II of the Constitution, applied to increasing the compensation during the term of office of an incumbent probate judge."

In Opinion No. 749, Opinions of the Attorney General for 1939, Vol. II, page 947, it was held that the terms "compensation" and "salary," as used in Article II, Section 20 of the Constitution of Ohio are not synonymous and that township trustees and clerks in office on September 2, 1939, the effective date of House Bill No. 477 of the 93rd General Assembly increasing the fees for such officers, are subject to the provisions thereof and could receive such increased compensation. This opinion relied principally on the cases of Thompson v. Phillips and Gobrecht v. Cincinnati, supra, and also cited the case of State, ex rel. Taylor v. Madison County, supra, and the 1917 opinion of the Attorney General.

In Opinion No. 387, Opinions of the Attorney General for 1945, page 473, the question involved was whether the repeal of a statute providing for certain fees to county commissioners for days actually engaged in work on certain improvements would be operative under the provisions of Article II, Section 20, to decrease the total compensation of a county commissioner where the repeal of such statute had become effective during his term of office. Although not reversing the 1917 or 1939 opinions, the then Attorney General concluded that the words "compensation" and "salary," as used in Article II, Section 20 of the Constitution, are used interchangeably and when the General Assembly has fixed the compensation of any officer, whether by way of salary or fees, or both, any change in such compensation effected by the enactment, amendment of or repeal of any law, shall not operate to increase or decrease the compensation of such officer during his existing term unless the office be abolished. In this 1945 opinion, the then Attorney General relied, to a large extent, on the cases of State, ex rel. v. Raine, State, ex rel. Lueders v. Beaman, State, ex rel. Boyd v. Tracy and State, ex rel. DeChant v. Kelser, all heretofore referred to in this opinion. As previously mentioned, and after referring to the other constitutional provisions relating to increase or decrease of compensation during term of office, said Attorney General stated that:

> "* * * it is inconceivable that the framers of the Constitution intended to establish one rule for one or more classes of public officers and another rule for the remainder."

That, in the construction of language employed in the Constitution, we may examine into the question of its plain and natural import, as understood by its framers and the people who adopted the instrument, by an examination of the debates and proceedings of the Constitutional Convention, is well established. Cass v. Dillon, 2 Ohio St., 621; State v. Kennon, 7 Ohio St., 563; State, ex rel. Boyd v. Tracy, 128 Ohio St., 242, 251.

An examination of the debates of the Ohio Constitutional Convention of 1850-1851, reported by J. V. Smith, Official Reporter, shows that the convention recognized a distinction between an officer receiving fees and one receiving compensation by way of salary. This subject matter was first introduced on May 29, 1850, as proposed Article II, Section 18, to read as follows:

> "The General Assembly shall by law fix the term of office of all officers not otherwise fixed in the constitution, and determine upon and regulate the compensation of all such officers, provided that no change therein shall affect the incumbent then in office for the term of office for which he shall have been elected or appointed."

Objection was immediately raised that the provision, as drafted, would prevent the increase or decrease of fees of the various local officers and some discussion pro and con was held that day. (Debates and Proceedings, Ohio Constitutional Convention, 1850-1851, Volume I, pages 233, 234).

On February 10, 1851, this subject matter was again introduced, as proposed Article II, Section 16, to read as follows:

> "The General Assembly shall fix by law, the term of office, and the compensation of all officers, not otherwise fixed in this Constitution, provided that no change therein shall affect the incumbent then in office, for the term of office for which he shall have been elected or appointed."

The same objection was again raised, whereupon Mr. Bennett stated that it seemed to him that the whole object might be accomplished by framing the provision so as to apply to salaried officers only. Mr. Hawkins then moved to amend such section "by inserting after the word 'the,' where

it first occurs in the proviso, the words 'salary of the.'" Such amendment was agreed to that day. (Debates and Proceedings, Ohio Constitutional Convention, 1850-1851, Volume II, page 561.)

Later amendments were made to this section, which eventually became Article II, Section 20, but the term "salary" was not affected by such later amendments.

Whether wisely or unwisely, I believe that an examination of the constitutional debates clearly reveals that the framers of the Constitution did intend to establish one rule for officers paid on a fee basis and another rule for officers paid on a fixed salary basis.

In summarization, it definitely appears that the framers of the Constitution of 1851 did not intend the terms "salary" and "compensation" to be used interchangeably or synonymously. However, I do not believe that the 1945 opinion of this office should be overruled. My reasoning for such conclusion is based upon the fact that in addition to the fees there involved, the county commissioner did receive a fixed salary. As heretofore pointed out in the cases of State, ex rel. v. Raine and Lueders v. Beaman, the officers there involved were not limited in their compensation to fees, but received, in addition thereto, such fixed salary. I conclude, however, that as to officers who do not receive any fixed salary, but whose compensation is derived solely from fees on a per diem payment, the provisions of Article II, Section 20 of the Constitution do not preclude the General Assembly from increasing or decreasing such compensation during their terms of office.

In specific answer to your question, it is my opinion that:

1. The terms "compensation" and "salary," as used in Article II, Section 20 of the Constitution of Ohio, are not synonymous. (Opinion No. 749, Opinions of the Attorney General for 1939, page 947, approved and followed.)

2. Under the provisions of Article II, Section 20 of the Constitution of Ohio, the Legislature may change the per diem compensation of any officer whose total compensation is based upon such per diem payment and who receives no "salary" in the sense of an annual or periodical payment for services dependent upon the time and not on the amount of service rendered. (Opinion No. 387, Opinions of the Attorney General for 1947, page 473, distinguished.)

3. Under the provisions of Section 1317, General Code, as amended by Amended Senate Bill No. 365, effective September 18, 1951, members of the Ohio State Dental Board are entitled to receive $15.00 for each day actually employed in the discharge of official duties after the effective date of such amendment.

Respectfully,

C. WILLIAM O'NEILL

Attorney General