

OPINION NO. 86-106

Syllabus:

1. The Superintendent of Banks and the Superintendent of Savings and Loans are "officers" as that term is used in Ohio Const.

- art. II, §20 and, as a result, they are subject to the provision that no change in compensation "shall affect the salary of any officer during his existing term, unless the office be abolished."
2. A statute or validly-adopted rule, effective before the commencement of the term of an officer, that provides for periodic increases in salary to take place automatically during the officer's term does not violate the prohibition of Ohio Const. art. II, §20 against in-term changes in compensation.
 3. Under R.C. 124.14, the Director of Administrative Services may, by rule, with the approval of the State Employee Compensation Board, determine the job classifications into which the positions of Superintendent of Banks and Superintendent of Savings and Loans are placed and the pay ranges to which such classifications are assigned.
 4. The Director of Administrative Services is not authorized to enact rules that by their terms set forth periodically-increased salary figures or periodic percentage increases in salary for the Superintendent of Banks or the Superintendent of Savings and Loans.

To: Kenneth R. Cox, Director, Ohio Department of Commerce, Columbus, Ohio
 By: Anthony J. Celebrezze, Jr., Attorney General, December 19, 1986

I have before me your request for an opinion concerning the establishment of incremental salary schedules for the Superintendent of Banks and the Superintendent of Savings and Loans.¹ Your request asks:

Is a rule, or statute, effective before the commencement of the term of Superintendent of Banks or Savings and Loans, whereby his compensation is

1 R.C. 1151.01 states, in part:

(A) In sections of the Revised Code making reference to building and loan associations and to the division of building and loan associations:

(1) "Building and loan association" means a corporation organized for the purpose of raising money to be loaned to its members or to others; "building and loan association" may be used interchangeably with and shall for all purposes have the same meaning as "savings and loan association" and "savings association," and "division of building and loan associations" may be used interchangeably with and shall for all purposes have the same meaning as "division of savings and loan associations." (Emphasis added.)

The title "Superintendent of Savings and Loans" is, thus, interchangeable with the title "Superintendent of Building and Loan Associations." See, e.g., R.C. 121.03.

automatically increased pursuant to a fixed schedule in conflict with [the provision of Ohio Const. art. II, §20] which states that "...no change therein shall affect the salary of any officer during his existing term," the word therein referring to the compensation fixed[?]

Ohio Const. art. II, §20 states:

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 terms of office and compensation of the Superintendent of Banks and the Superintendent of Savings and Loans are not provided for in the Constitution. Your request assumes that the Superintendent of Banks and the Superintendent of Savings and Loans are officers for purposes of Ohio Const. art. II, §20 and, thus, that their salaries are subject to its provisions. I agree that this is the case.

Ohio Const. art. II, §20, has been construed as adopting the ordinary definition of "officer" set forth, as follows, in State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917):

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....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.

....
 ...[I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

See State ex rel. Milburn v. Pethel, 153 Ohio St. 1, 90 N.E.2d 686 (1950); 1985 Op. Att'y Gen. No. 85-036; 1980 Op. Att'y Gen. No. 80-050. Both the Superintendent of Banks and the Superintendent of Savings and Loans are appointed by the Governor, with the advice and consent of the Senate, and hold office for four-year terms. R.C. 121.08. The Superintendent of Banks administers the Division of Banks, and the Superintendent of Savings and Loans administers the Division of Building and Loan Associations. R.C. 121.08. Both such divisions are within the Department of Commerce; the Director of Commerce is, however, not empowered to vary the functions imposed by statute upon those divisions. R.C. 121.08. The functions prescribed by statute involve the exercise of continuing, independent governmental functions. See, e.g., R.C. 1125.06(A) ("[t]he superintendent of banks shall have all powers and perform all duties vested in the division of banks and shall see that all laws relating to the business of banking are administered and applied in accordance with the purpose of Chapters 1101. to 1129. of the Revised Code, as expressed in

section 1101.06 of the Revised Code"); R.C. 1155.01 ("[t]he superintendent of building and loan associations shall see that the laws relating to building and loan associations and deposit guaranty associations are executed and enforced"). See also, e.g., R.C. 1101.07; R.C. 1103.07; R.C. 1113.02-.05; R.C. 1125.02; R.C. 1125.05; R.C. 1125.06(B); R.C. 1125.08; R.C. 1151.05; R.C. 1151.18; R.C. 1155.02; R.C. 1155.03; R.C. 1155.06; R.C. 1157.01-.02. I conclude, therefore, that the Superintendent of Banks and the Superintendent of Savings and Loans are officers for purposes of Ohio Const. art. II, §20. Cf. 1963 Op. Att'y Gen. No. 56, p. 128 (concluding that, for purposes of vacation provisions then appearing in R.C. 121.161, the Superintendent of Banks was a state officer, and not a state employee, because he exercised independent duties in accordance with directions provided by law, and concluding that the Superintendent of Building and Loan Associations was a state employee under R.C. 121.161 because he was then under the direction, supervision and control of the Director of Commerce pursuant to R.C. 121.04 and R.C. 121.07; R.C. 121.04 has since been amended). See generally 1983 Op. Att'y Gen. No. 83-004. It follows that the salaries of the Superintendent of Banks and the Superintendent of Savings and Loans are subject to the provision of Ohio Const. art. II, §20 that states: "no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Your letter of request proposes the adoption of an incremental salary schedule, under which the amount paid to each of the superintendents in question automatically increases annually, either by a set dollar amount or by a specified percentage, according to a scale set forth before the term of the particular superintendent begins. Your request states:

There would be no legislative or administrative action during the officer's term which grants a salary increase but rather the compensation of the officer would be automatically increased during his term by reason of a scale set, in rule or law, before the term begins. To our knowledge no one has ever contended that a rule, promulgated prior to term, which provides a fixed scale for determining salary rather than providing a fixed dollar amount is unconstitutional. We believe it can be concluded that salary provisions in effect at the time the officer takes office govern, whether these are expressed on an annual or a four (4) year term basis.

I agree with this proposition, and I find that it is consistent with Ohio Const. art. II, §20.

Statutory provisions granting automatic periodic salary increases during an officer's term have been found to be constitutional where they were in effect before the commencement of the term. See, e.g., 1978 Op. Att'y Gen. No. 78-023 at 2-54 ("[t]he General Assembly may...establish a 'sliding scale' salary schedule for officers, and where it is in effect prior to the officer's existing term in office, his salary can vary according to the schedule"); 1975 Op. Att'y Gen. No. 75-054 at 2-213 ("it is apparent that the implementation of yearly increases in the salary of county auditors...does not violate [Ohio Const. art. II, §20]. Moreover, it is apparent that [Ohio Const. art. II, §20] contemplates a change in the compensation of public officers enacted during their term of office and not...one that is

enacted prior to the commencement of an officer's term but implemented during such term") (emphasis in original); 1974 Op. Att'y Gen. No. 74-021 at 2-100 ("[Ohio Const. art. II, §20] does not prohibit an officer from receiving, during his term, automatic periodic raises embodied in a statute which became effective prior to the beginning of such term").

The finding of constitutionality in the opinions cited above was based, in part, upon State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 39 N.E.2d 840 (1942). The Guckenberger case involved a former constitutional provision that prohibited an in-term change in the compensation of certain judges.² The court held, in paragraph three of the syllabus:

A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during his term by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court "shall not be diminished or increased during his term of office."

The change in compensation considered in Guckenberger resulted from a change in population, rather than simply from the application of a prescribed salary schedule with periodic increases. The same principles applicable to Guckenberger are, however, applicable to the situation you have described:

The inhibition...is directed to the Legislature and not to the officer who pays the compensation or 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 it in 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. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits.

139 Ohio St. at 282-83, 39 N.E.2d at 845 (emphasis added; emphasis by the court omitted). The Guckenberger case was recently cited with approval by the Ohio Supreme Court in

² Ohio Const. art. IV, §6 now states, in part:

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office.

Schultz v. Garrett, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983). The syllabus of Schultz v. Garrett states:

Where a statute setting forth the formula for the compensation of an officer is effective before the commencement of such officer's term, any salary increase which results from a change in one of the factors used by the statute to calculate the compensation is payable to the officer. Such increase is not in conflict with Section 20, Article II of the Constitution when paid to the officer while in term. (State, ex rel. Edgecomb, v. Rosen, 29 Ohio St. 2d 114 [279 N.E.2d 870 (1972)], overruled.)

It is clear from the authorities discussed above that a statutory provision setting forth automatic salary increases to take effect during an officer's term does not violate the in-term change prohibition of Ohio Const. art. II, §20, where the statutory provision is in effect prior to the commencement of the term. The same conclusion obtains where the provisions establishing automatic salary increases appear in validly-adopted rules. See generally Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120, 125, 77 N.E.2d 921, 924 (1948) (a rule of an administrative agency "issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter"); Op. No. 80-050. I conclude, therefore, that a statute or validly-adopted rule effective before the commencement of the term of an officer that provides for periodic increases in salary to take place automatically during the officer's term does not violate the prohibition of Ohio Const. art. II, §20 against in-term changes in compensation.³

It is clear from the discussion above that the General Assembly may constitutionally enact a statute that will establish periodic increases in compensation specifically for the Superintendent of Banks or the Superintendent of Savings and Loans, and that such statute will apply to terms commencing after its effective date. No such statute is, however, currently in effect. Rather, the compensation of those

³ The first clause of Ohio Const. art. II, §20 requires the General Assembly to fix the compensation of all officers. In instances in which the General Assembly has permitted such compensation to be set or modified by rule or administrative action there may, therefore, be questions concerning the validity of the delegation of authority by the General Assembly. See generally, e.g., Livingston v. Clawson, 2 Ohio App. 3d 173, 440 N.E.2d 1383 (Miami County 1982) (stating that an act of the General Assembly that placed in the hands of county commissioners the decision as to whether to grant a salary increase to certain elected county officers violated Ohio Const. art. II, §20, and Ohio Const. art. II, §26, which provides that laws of a general nature shall have uniform operation throughout the state, and that even if the delegation of the power to set salaries were found to be permissible, the delegation attempted by that act lacked sufficient standards); 1983 Op. Att'y Gen. No. 83-004; 1980 Op. Att'y Gen. No. 80-050. I am, for purposes of this opinion, assuming the validity of the existing statutory scheme, discussed infra, and rules adopted thereunder.

superintendents is determined under the scheme set forth in R.C. 124.14-.152, discussed below.

I turn next to the question whether, under existing statutes, any administrative body is authorized to enact a rule establishing periodic increases in compensation for the Superintendent of Banks or the Superintendent of Savings and Loans. Pursuant to R.C. 124.14(A):

The director of administrative services with the approval of the state employee compensation board⁴ shall establish, and may modify or repeal, by rule a job classification plan for all positions, offices, and employments the salaries of which are paid in whole or in part by the state....The director with the approval of the board shall by rule assign each classification...to a pay range established under section 124.15 or section 124.152 of the Revised Code. (Footnote added.)

See also R.C. 124.09(A). The Director of Administrative Services is, thus, authorized, with the approval of the State Employee Compensation Board, to establish a job classification plan including the positions of Superintendent of Banks and Superintendent of Savings and Loans and to assign the classifications including those positions to pay ranges established under R.C. 124.15 or R.C. 124.152.

R.C. 124.15(A) states: "Except as provided in division (L) or (M) of this section, all employees working for the state or any of the several departments, commissions, bureaus, boards, or councils of the state shall be paid a salary or wage in accordance with the following schedules of rates...." Division (L) applies to certain employees of the State School for the Deaf and the State School for the Blind. Division (M) states that R.C. 124.15(A) "does not apply to 'exempt employees' as defined in section 124.152 of the Revised Code who are paid under that section." R.C. 124.152, recently enacted by Sub. H.B. 831, 116th Gen. A. (1986) (eff. April 9, 1986), is applicable to persons who are exempt from the collective bargaining provisions of R.C. Chapter 4117. R.C. 124.152(E). The Superintendent of Banks and the Superintendent of Savings and Loans are such "exempt employees." See R.C. 4117.01(C), (F), (K). I am, therefore, for purposes of this opinion, considering only those pay ranges that appear in R.C. 124.152.

R.C. 124.152 divides pay ranges into two schedules. Schedule E-1 consists of pay ranges designated one through sixteen. Distinct hourly and annual figures are set for each range, and varying numbers of step increases are established. Employees paid under Schedule E-1 are advanced to succeeding steps in the range for their class according to the schedule established in R.C. 124.15(G). Further, R.C. 124.152 contains different versions of Schedule E-1, effective at six-month intervals through July of 1988, that contain increases in each

⁴ Pursuant to R.C. 124.16, the State Employee Compensation Board consists of the Director of Administrative Services, Director of Budget and Management, Auditor of State, a member of the House designated by the Speaker, and a member of the Senate designated by the President.

of the figures set forth in Schedule E-1. On the appropriate effective dates, employees who are compensated pursuant to Schedule E-1 will receive the increases set forth therein.

Schedule E-2 of R.C. 124.152 consists of pay ranges designated forty-one through forty-nine. Maximum and minimum hourly figures are established for each range. R.C. 124.15(H) states:

Employees in appointive managerial or professional positions paid under salary schedule C of this section or under salary schedule E-2 of section 124.152 of the Revised Code may be appointed at any rate within the appropriate pay range. This rate of pay may be adjusted higher or lower within the respective pay range at any time the appointing authority so desires as long as the adjustment is based on the individual's ability to successfully administer those duties assigned to him. Salary adjustments shall not be made more frequently than once in any six-month period under this provision to incumbents holding the same position and classification.

Thus, the exact salary of an individual appointed to a position under Schedule E-2 is established, within the permitted range, by the person who makes the appointment. The rate of pay may be adjusted higher or lower, within the pay range, no more frequently than once in a six-month period. Adjustments are to be "based on the individual's ability to successfully administer those duties assigned to him." R.C. 124.152 does, however, contain different versions of Schedule E-2, analogous to the different versions of Schedule E-1, that set forth increased figures to become effective at six-month intervals through July of 1988. The various versions contain increases in the minimum and maximum amounts of compensation permitted. A person paid under Schedule E-2 might, thus, have his compensation increased as a matter of law if the amount he is being paid is less than the amount to which he becomes entitled as one of the statutory increases takes place.

Your specific question is whether the Director of Administrative Services may enact a rule using language comparable to that in R.C. Chapter 141 providing for periodic salary increases⁵ or a sentence that states: "In calendar year 1988 the annual salary of the Superintendent...shall be an amount produced by increasing \$ (1987 base) by ___% compounded for each of the years 1988, 1989, and 1990." That question must be answered in the negative. Under the existing statutory

⁵ R.C. 141.011 prescribes salary increases for elected state officers in terms of base salary amounts increased "by five percent compounded" for specified years, and in terms of "five per cent more" than the preceding year. R.C. 141.04 prescribes salary increases for judges in terms of specified dollar amounts beginning on particular dates. These are the types of salary increases to which your request evidently relates. R.C. 141.05, R.C. 141.06, and R.C. 141.07 prescribe additional compensation for certain judges based upon the population of the county, upon the combination of offices, or upon the performance of services outside the county; it does not appear that you are concerned with these types of additional compensation.

scheme, the Director of Administrative Services is authorized to classify the positions of Superintendent of Banks and Superintendent of Savings and Loans and to assign the classifications in which the positions appear to pay ranges established by statute. R.C. 124.14. The Director is not, however, authorized to enact a rule that by its terms establishes a figure for the salary of such a superintendent or that grants the person holding such position a periodic numerical or percentage increase in salary.

The Director of Administrative Services has, by the enactment of [1985-1986 Monthly Record] Ohio Admin. Code 123:1-7-11 at 1106, assigned job classification number 61715, entitled "Superintendent of Banks," and job classification number 61716, entitled "Superintendent of Building and Loan Associations," to pay range 44, which appears in R.C. 124.152 as part of Schedule E-2. Under the existing scheme, each of the superintendents in question is, therefore, appointed by the Governor at any rate within pay range 44 of Schedule E-2 of R.C. 124.152 that the Governor designates. By the establishment of this statutory scheme, the General Assembly has delegated to the Governor the authority to fix the compensation of the Superintendent of Banks and the Superintendent of Savings and Loans, within such pay range as is designated for those positions by the Director of Administrative Services. See generally note 3, supra. R.C. 124.15(H) permits the rate of pay of persons paid under salary schedule E-2 of R.C. 124.152 to be adjusted higher or lower within the respective pay range, no more frequently than once every six months, based upon the individual's ability to successfully administer the duties assigned to him. It does not, however, appear that the Governor may provide such salary adjustments for the superintendents in question.

The Governor's authority to fix the compensation of the superintendents is derived from the General Assembly, see Ohio Const. art. II, §1, 20; State ex rel. Metcalfe v. Donahey, 101 Ohio St. 490, 129 N.E. 594 (1920), and, therefore, cannot exceed such authority as the General Assembly possesses. See City of Columbus v. Public Utilities Commission, 103 Ohio St. 79, 132, 133 N.E. 800, 818 (1921) (Wanamaker, J., concurring) ("[t]he legislature cannot create an agency, board or commission to do an act which the constitution says that the principal may not do"); Op. No. 80-050. The General Assembly is prohibited by art. II, §20 from enacting a change in the compensation of an officer during his existing term and is, therefore, unable to delegate to the Director of Administrative Services or the Governor the capacity to enact such a change. See State ex rel. Holmes v. Thatcher, 116 Ohio St. 113, 115, 155 N.E. 691, 691 (1927) (no case "decided by this court has ever approved any statute, or any other legislative authority or quasi legislative authority, to increase the salary of any officer during an existing term of office"); Op. No. 80-050 at 2-206 ("[t]he legislature may not constitutionally grant an increase in term to the members of [a board of education]. Therefore, the board is also barred from taking such action"). Cf. 1983 Op. Att'y Gen. No. 83-004 (distinguishing action by the General Assembly from action by an administrative officer for purposes of Ohio Const. art. II, §4, which prohibits a member of the General Assembly, during his term or for one year thereafter, from being appointed to a public office if its compensation was increased during his term). See generally State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976); 1984 Op. Att'y Gen. No. 84-069; 1958 Op.

Att'y Gen. No. 1907, p. 196; 1955 Op. Att'y Gen. No. 5805, p. 478. Under the existing scheme, a superintendent may, however, be entitled to an increase pursuant to statute if the minimum amount that may be paid under pay range 44 of Schedule E-2 exceeds that which the superintendent is receiving, because of the periodic increases in the entire schedule contained in R.C. 124.152(B), (C), and (D), provided that the superintendent was appointed after the statutory provisions establishing the higher salary were enacted. See generally Op. No. 83-004.

The Director of Administrative Services may, by rule, with the approval of the State Employee Compensation Board, modify a classification or the assignment of a classification to an appropriate pay range. R.C. 124.14. Any such modification that affects the compensation of the Superintendent of Banks or the Superintendent of Savings and Loans and that is in effect before the superintendent's term begins will be applicable to the superintendent.⁶ The Director of Administrative Services may, thus, select from the pay ranges provided by statute the one in which each of the superintendents is to be classified at a particular time. If the statutorily established pay range includes automatic increases established before the term of a particular superintendent begins, the superintendent may, as discussed above, receive those increases. The Director of Administrative Services may not, however, modify the amounts that are set forth in R.C. 124.152 or provide that the compensation of the superintendents in question is to be determined by any means other than by reference to an appropriate pay range established by statute.⁷

It is, therefore, my opinion, and you are hereby advised, as follows:

1. The Superintendent of Banks and the Superintendent of Savings and Loans are "officers" as that term is used in Ohio Const. art. II, §20 and, as a result, they are subject to the provision that no change in compensation "shall affect the salary of any officer during his existing term, unless the office be abolished."

⁶ Since your request relates only to rule changes that are in effect before a particular term begins, I am addressing only such changes. I am not considering the effect of a rule change upon an individual who holds office at the time that the rule is adopted. See generally 1983 Op. Att'y Gen. No. 83-004; 1980 Op. Att'y Gen. No. 80-050.

⁷ The existing statutory scheme permits the compensation of certain officers and employees to be established by means other than reference to the pay ranges set forth in R.C. 124.15 and R.C. 124.152. For example, R.C. 124.14(B) states that R.C. 124.15 and R.C. 124.152 do not apply to elected officials, legislative employees, employees of the Legislative Service Commission or the Supreme Court, employees in the office of the Governor, employees of a county children services board that establishes compensation rates under R.C. 5153.12, or positions for which the authority to determine compensation is given by law to another individual or entity. R.C. 124.14 (H) and (I) permit the Director of Administrative Services, with

2. A statute or validly-adopted rule, effective before the commencement of the term of an officer, that provides for periodic increases in salary to take place automatically during the officer's term does not violate the prohibition of Ohio Const. art. II, §20 against in-term changes in compensation.
3. Under R.C. 124.14, the Director of Administrative Services may, by rule, with the approval of the State Employee Compensation Board, determine the job classifications into which the positions of Superintendent of Banks and Superintendent of Savings and Loans are placed and the pay ranges to which such classifications are assigned.
4. The Director of Administrative Services is not authorized to enact rules that by their terms set forth periodically-increased salary figures or periodic percentage increases in salary for the Superintendent of Banks or the Superintendent of Savings and Loans.

the approval of the Controlling Board, to establish the rate and method of compensation for employees paid by warrant of the Auditor of State who serve in positions that cannot practicably be included in the state job classification plan, and to set the rate of compensation and employee benefits for intermittent, seasonal, temporary, emergency, and casual employees who are not considered public employees for purposes of R.C. Chapter 4117, governing public employees' collective bargaining. R.C. 124.15(J) states: "The director of administrative services with the approval of the state employee compensation board shall establish the rate and method of payment for members of boards and commissions." The Superintendent of Banks and Superintendent of Savings and Loans do not come within these exceptions to the general applicability of R.C. 124.15 and 124.152. See 1 Ohio Admin. Code 123:1-7-01 ("[a]ll positions in the state service shall be classified in accordance with [R.C. 124.14] unless specifically exempted by law").