

OPINION NO. 85-036**Syllabus:**

Ohio Const. art. II, §20 prohibits a member of a board of education of a county school district from receiving, during his term of office, an increase in the rate at which he may be reimbursed for mileage expenses.

To: John W. Allen, Richland County Prosecuting Attorney, Mansfield, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 11, 1985

I have before me your request for my opinion concerning whether Ohio Const. art. II, §20 prohibits a member of a county board of education, who was holding office when Am. Sub. H.B. 897, 115th Gen. A. (1984) (eff. Dec. 26, 1984) was passed increasing the rate at which board members may be reimbursed for their mileage expenses, from receiving such increased mileage allowance.

R.C. 3313.12 provides for the payment of compensation to members of a county board of education as follows:

Each member of the county board of education may be paid such compensation as the board provides by resolution, provided that any such compensation shall not exceed forty dollars a day during 1984, sixty dollars a day during 1985, seventy dollars a day during 1986, and eighty dollars a day during 1987 and thereafter, plus mileage at the rate of twenty cents a mile both ways to cover the actual and necessary expenses incurred during his attendance upon any meeting

of the board. Such expenses and the expenses of the county superintendent, itemized and verified, shall be paid from the county board of education fund upon vouchers signed by the president of the board.

Prior to the enactment of Am. Sub. H.B. 897, R.C. 3313.12 provided that a county board of education could pay its members a mileage allowance of fifteen cents per mile to cover actual and necessary expenses incurred during attendance at any board meeting. See 1977-1978 Ohio Laws, Pt. I, 807 (Am. S.B. 248, eff. Nov. 21, 1977). Am. Sub. H.B. 897 amended R.C. 3313.12 to allow for an increase in the mileage rate payable to county board of education members to twenty cents per mile. You wish to know whether incumbent board members may receive, during their term of office, the benefit of the recent amendment to R.C. 3313.12.

Ohio Const. art. II, §20 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."

In order to ascertain the applicability of Ohio Const. art. II, §20, I must first determine whether a member of a county board of education is a public officer for purposes of this provision. The indicia of public office are set forth in State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917) as follows:

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.

. . . .

. . .it 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. Pethtel, 153 Ohio St. 1, 90 N.E.2d 686 (1950); State ex rel. Gordon v. Zangerle, 136 Ohio St. 371, 26 N.E.2d 190 (1940).

In reliance on Landis, my predecessor concluded in 1980 Op. Att'y Gen. No. 80-050 that a member of a board of education of an exempted school district is a public officer for purposes of Ohio Const. art. II, §20, noting that such a board member must take an oath of office and that the member's official duties are prescribed by various statutes and relate to the performance of a governmental function, the administration of public education.

Like members of a board of education of an exempted school district, members of a county board of education are elected, R.C. 3313.01, serve a fixed term of office, R.C. 3313.09, and must take an oath of office, R.C. 3313.10. County boards of education perform governmental policy-making functions and duties with regard to public education. Those functions have been expressly delegated to county boards of education by the General Assembly. See, e.g., R.C. Chapter 3313. I conclude, therefore, that members of a county board of education are public officers for purposes of Ohio Const. art. II, §20.

I turn now to the question whether an increase in the rate of reimbursement for mileage expenses represents an increase in compensation for purposes of Ohio Const. art. II, §20.

It is by now well established that art. II, §20 prohibits a public officer from receiving, during his term, not only an increase in his fixed salary, but also an

increase in the amount allowed him for the expenses he incurs in performing his official duties. In State ex rel. v. Raine, 49 Ohio St. 580, 31 N.E. 741 (1892), the court addressed the issue whether incumbent county commissioners could receive the benefit of a newly enacted statutory provision allowing commissioners one thousand dollars per year for expenses incurred in the discharge of their duties. The court concluded that the allowance constituted salary for purposes of Ohio Const. art. II, §20 and thus could not be paid to a commissioner who held his office when the provision was enacted. In State ex rel. Boyd v. Tracy, 128 Ohio St. 242, 190 N.E. 463 (1934), the court discussed the application of Ohio Const. art. II, §31, which prohibits members of the General Assembly from receiving in-term increases in compensation, to a statute which granted legislators a sum sufficient to pay expenses, but which was not to exceed four dollars per day for room and board. The court concluded that such reimbursement for expenses was compensation which could not be paid to incumbent legislators. State ex rel. Harbage v. Ferguson, 68 Ohio App. 189, 36 N.E.2d 500 (Franklin County 1941), appeal dismissed, 138 Ohio St. 617, 37 N.E.2d 544 (1941), although not specifically dealing with in-term increases, concluded that reimbursement for a legislator's travel expenses constitutes part of his compensation for purposes of art. II, §31.

In 1979 Op. Att'y Gen. No. 79-102, my predecessor addressed the question whether incumbent board members of a general health district were entitled to receive an increase in the rate of reimbursement for mileage expenses. R.C. 3709.02,¹ which prescribes the compensation of such board members, had been amended, increasing the per diem allowance and the mileage rate to which board members were entitled. My predecessor concluded that incumbent board members were prohibited by Ohio Const. art. II, §20 from receiving the increase in the per diem allowance and the increased mileage rate. My predecessor reasoned that art. II, §20 prohibits an incumbent from receiving an increase in the number of dollars payable to the officer during his term, and that if the number of dollars payable to a board member as a per diem allowance or as reimbursement for mileage expenses were increased, he would, in effect, receive an increase in salary or compensation for purposes of art. II, §20. See generally State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976) (fringe benefits are a component of compensation for purposes of Ohio Const. art. II, §20); State ex rel. Artmayer v. Board of Trustees, 43 Ohio St. 2d 62, 336 N.E.2d 684 (1975) (the terms "salary" and "compensation," as used in Ohio Const. art. II, §20, are synonymous).

In sum, a member of a board of education of a county school district is prohibited from receiving, during his term of office, an increase in the rate of reimbursement for mileage expenses. I believe that this is so even though mileage payments are intended to reimburse the board member for the expenses he has incurred in attending meetings of the board of education.

In conclusion, it is my opinion, and you are advised, that, Ohio Const. art. II, §20 prohibits a member of a board of education of a county school district from receiving, during his term of office, an increase in the rate at which he may be reimbursed for mileage expenses.

¹ R.C. 3709.02 contains language similar to that of R.C. 3313.12 and reads in part as follows:

Each member of the board shall be paid twenty dollars a day and mileage at the rate of fifteen cents a mile to and from the place of meeting to cover the actual and necessary expenses incurred during his attendance at any meeting of the board and not exceeding five meetings of board committees in any one year.