

Code, need not be recorded in the office of the Secretary of State after the effective date of Amended Senate Bill No. 153.

2. Commissions issued to a special policeman pursuant to the provisions of Section 9150, General Code, and recorded with the Secretary of State under the provisions of Amended Senate Bill No. 153 (effective September 4, 1935) entitle such policeman to act in such capacity on the premises of his employer or elsewhere when directly in the discharge of his duties.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4431.

BOARD OF EDUCATION—COMPENSATION OF MEMBERS
THEREOF NOT “SALARY”—EXPENSE ALLOWANCE IN
SECTION 4734, G. C., NOT PERMITTED AFTER JUNE 12,
1935.

SYLLABUS:

1. *Neither the expense allowance for members of a county board of education as fixed by former Section 4734, General Code, nor the compensation provided for members of rural boards of education under former Section 4715, General Code, is “salary” as the term “salary” is used in Section 20, Article II of the Constitution of Ohio, forbidding a change in salary of a public officer during his term of office.*

2. *Incumbents of the office of member of a county board of education are not entitled to the three dollars per day allowance for expenses for attendance upon meetings of the board as provided for by former Section 4734, General Code, after June 12, 1935, the effective date of the amendment of the said statute, by the terms of which amendment the said three dollars per day expense allowance provided for by the former statute was not allowed; nor are present members of rural boards of education entitled to the per diem compensation for attendance upon meetings of the board provided for by former Section 4715, General Code, after June 12, 1935, the effective date of the repeal of the said statute.*

COLUMBUS, OHIO, July 18, 1935.

HON. KARL M. WEANER, JR., *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Does the repeal of Sections 4715 and 4734 of the General Code of Ohio, effective June 12, 1935, prohibit the payment of compensation provided for in the repealed sections to the present incumbents of the county board of education and the boards of education of rural school districts during their terms of office.”

Former Sections 4715 and 4734, General Code, read as follows:

“Sec. 4715. Each member of the board of education of rural school districts, except such districts as contain less than sixteen square miles, shall receive as compensation two dollars for each regular meeting actually attended by such member, and members of such boards in rural school districts containing less than sixteen square miles shall receive one dollar for each meeting, but for not more than ten meetings in any year. The compensation allowed members of the board shall be paid from the contingent fund.”

“Sec. 4734. Each member of the county board of education shall be paid three dollars a day and mileage at the rate of ten cents a mile one way, to cover his 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.”

By the terms of the Traxler-Keifer-Matthews Act of the 91st General Assembly (Amended Substitute House Bill No. 466) effective June 12, 1935, Section 4715, General Code, was repealed and Section 4734, General Code, was amended to read as follows:

“Each member of the county board of education shall be paid mileage at the rate of ten cents a mile one way 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.”

The Constitution of Ohio, in Article II, Section 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.”

It is well settled that the provisions of Article II, Section 20, of the Ohio Constitution are applicable to all who fall within the classification of public officers, at least those whose term of office and salary are fixed by the General Assembly. *State ex rel. McNamara vs. Campbell*, 94 O. S., 403; *Donahey vs. State*, 101 O. S., 473; *Theobald vs. State*, 10 O. C. C. (N. S.) 175, affirmed without opinion, in 78 O. S., 426; *State ex rel. Stanton vs. Zangerle*, 32 O. C. A., 273, affirmed 105 O. S., 650.

It is equally well settled that members of boards of education are public officers. O. Jur. Vol. 36, p. 169; *Schwing vs. McClure*, 120 O. S., 335; *State ex rel. vs. Ring*, 126 O. S., 203. Their term of office and salary, if any, have been fixed by the General Assembly.

The question presented by your inquiry is whether or not the compensation fixed by former Section 4715, General Code, for members of rural boards of education and the allowance of three dollars per day provided for by the terms of former Section 4734, General Code, for expenses of members of county boards of education, are salaries within the meaning of the term "salary" as used in Article II, Section 20, of the Constitution of Ohio. If so, these amounts cannot be changed during the term of office of the present incumbents and the change made to apply to these incumbents. If the amounts fixed by these statutes are salaries the repeal of Section 4715, General Code, and the amendment of Section 4734, General Code, would have no effect in so far as the right of present incumbents of the offices of members of boards of education to the compensation and expense allowance provided for by the former statutes, is concerned. On the other hand, if the provisions of these former sections are to be construed as not providing salaries, as the term is used in the Constitution, the amount so fixed might be changed during the term of the present incumbent, or entirely cut off, and the repeal of Section 4715, General Code, and the amendment of Section 4734, General Code, would serve to take away from the present incumbents the right to the compensation and expense allowance provided for in these former statutes, immediately upon the effective date of the repeal and amendment.

Section 4734, General Code, as enacted in 1914 (104 O. L., 133-137) provided that:

"Each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the board."

While this statute was in force in that form, the then Attorney General, in 1914, held that the office of member of a county board of education was not a lucrative office within the term "lucrative office" as used in Article II, Section 4, of the Constitution of Ohio, which provides that:

“No person holding * * any lucrative office under the authority of this state shall be eligible to have a seat in the General Assembly.”

See Annual Report of the Attorney General for 1914, Volume I, page 817.

This statute was amended in 1919 (108 O. L., 707), to read as it did prior to its last amendment in 1935. (See *supra*). The question again arose as to the eligibility of a member of the county board of education to a seat in the General Assembly, and the question turned upon whether or not the provision for three dollars per day, as contained in the statute as amended made the office a lucrative office. The then Attorney General in an opinion dealing with the matter, after referring to the 1914 opinion and quoting the statute as amended, stated:

“It would appear therefore, that there has been no material change in the language of Section 4734, General Code, except that the necessary expenses incurred had a limitation put upon them after September 22, 1919; that is \$3.00 per day, and nowhere in such section is there any indication that such \$3.00 is to be considered as compensation.”

See Opinions of the Attorney General for 1920, page 373.

The above 1920 opinion was referred to with approval, in 1927, by the then Attorney General, in an opinion which will be found in the reported Opinions of the Attorney General for that year, Volume II, page 881.

In Ohio Jurisprudence, Volume 32, page 1028, Section 168, it is stated:

“It was shown in the preceding section that the constitutional prohibition (as to change of salaries of public officers during their term) applied to only those officers receiving a salary, and that a salary was an annual or periodical payment for services—a payment dependent on the time and not on the amount of service. * * Certainly as to the amount to be paid an officer for services is the distinguishing feature of a salary. Compensation based upon a method of ascertainment producing different amounts at different times, is not salary. *State ex rel. Taylor vs. Madison Co.*, 13 O. D. (N. P.) 97.”

It seems clear from the language employed in former section 4714, General Code, that the allowance of three dollars per day and mileage to members of a county board of education for attendance upon meetings of the board, is an allowance merely for expenses, and can not be regarded as “salary”. That is the interpretation placed upon this language by former Attorneys General, as noted above. Moreover, the amount of this allowance which members may receive, is dependent upon whether or not the member attends the meetings. In the case of *Gobrecht vs. Cincinnati*, 51 O. S., 68, it is held:

“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.”

It will be observed from the terms of former Section 4715, General Code, that the per diem allowance therein provided for members of a rural board of education is to be allowed for “each regular meeting actually attended by such member.” Under the doctrine of the *Gobrecht* case which appears to be directly in point, the allowance to members of a rural board of education as fixed by this statute clearly was not a “salary” within the meaning of that term as used in Article II, Section 20 of the Constitution of Ohio. Any change in the expense allowance as provided for by former Section 4734, General Code, for present members of a county board of education or the per diem allowance as provided for by former Section 4715, General Code, for the present members of rural boards of education would not be a change in salary and would not be a violation of Section 20 of Article II of the Constitution of Ohio.

I am therefore of the opinion that the present incumbents of the office of member of a county board of education are not entitled to the three dollars per day allowance for expenses for attendance upon meetings of the board as provided for by former Section 4734, General Code, after June 12, 1935, the effective date of the amendment of the said statute by the terms of which amendment the said three dollars per day expense allowance provided for by the former statute was not allowed; nor are present members of rural boards of education entitled to the per diem compensation for attendance upon meetings of the board provided for by former Section 4715, General Code, after June 12, 1935, the effective date of the repeal of the said statute.

Respectfully,

JOHN W. BRICKER,
Attorney General.