

June 14, 2019

Laura Kohler, President
State Board of Education
25 South Front Street
Columbus, Ohio 43215

SYLLABUS:

2019-019

Pursuant to Article II, Section 20 of the Ohio Constitution, if the State Board of Education amends its policies and procedures manual, as has been proposed, so as to increase the activities and number of hours for which voting members of the Board may be compensated, a board member may not take advantage of the increase unless the amended version of the manual was in effect at the start of the voting member's current term of office.



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OPINION NO. 2019-019

Laura Kohler, President
State Board of Education
25 South Front Street
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Dear President Kohler:

By your letter of April 24, 2019, you have requested of us an opinion which relates to the compensation of voting members of the State Board of Education (the Board). You indicate that the Board “was established by an amendment to the Ohio Constitution in November 1953,” and that “Ohio Revised Code Section 3301.03 establishes the qualifications and salary of voting members of the State Board, which include both elected and appointed members.”

You advise us that the Board has “adopted (and has amended from time to time) a Policies and Procedures Manual, which specifies the time and activities (e.g., attendance at Board/Committee meetings, time spent on education-related panels or professional development) for which members are paid.” You write that the Board currently “is considering modifying the Policies and Procedures Manual to expand the type of activities undertaken by members in their official capacities for which time spent by members in performing those activities would be compensated.” Under the contemplated expansion, Board members would continue to “be compensated at the current hourly rate established for members of the board.”

It is in this context that you pose the following question:

If the State Board of Education increases the activities and number of hours for which voting members of the board can be compensated, must the increase be effective only upon the expiration of a voting member’s current term?

R.C. 3301.01(A) creates the state board of education. The board consists of nineteen voting members, eleven of whom are elected from specified districts, and eight of whom are appointed by the governor with the advice and consent of the senate. Each of these members serves a finite term of four years. R.C. 3301.02(A).

R.C. 3301.03(C) requires that “[b]efore entering on the duties of office, each elected and appointed voting member shall subscribe to the official oath of office.” This section provides further that

[e]ach voting member of the state of board of education shall be paid a salary fixed pursuant to division [R.C. 124.15(J)] together with the member’s actual and necessary expenses incurred while engaged in the performance of the member’s official duties or in the conduct of authorized board business, and while en route to and from the member’s home for such purposes.

R.C. 3301.03(C). R.C. 124.15(J) provides that, unless the compensation of a member of a board or commission is otherwise set by statute, “the director of administrative services shall establish the rate and method of payment for members of boards and commissions pursuant to the pay schedules listed in [R.C. 124.152].” It is our understanding that the director of administrative services has established the currently applicable hourly rate of pay for members of the Board, and that your inquiry does not involve any proposed modification of that rate, but only an increase in the hours for which a member may be compensated at that hourly rate.

Your office has provided us with a copy of that portion of the Policies and Procedures which previously were adopted by the Board and are in current effect. At Paragraph G on Page 7 of the Policies and Procedures Manual it is provided that:

G. State Board Member Compensation and Expenses
COMPENSATION FOR TIME

Actual Attendance at Board/Committee Meetings: Members shall be paid the amount provided by law for each hour, or part thereof, in actual attendance at any meeting of the State Board and at official State Board committee meetings.

Time Spent on Education Panel: Members may be compensated for time spent as members of education-related commissions, panels, councils and task forces in Ohio, which are separate entities from the State Board of Education and its committees provided the State Board has directed the member to represent the State Board on the commission, panel, council or task force.

Time Spent on Professional Board Development: Members may be paid up to 40 hours per year for time spent on professional State Board development consistent with terms outlined in Section F above.

Time Spent in School/School Facilities: Members may be paid up to 100 hours per year for time spent in schools or school facilities (visiting or touring), not to include travel time. Members shall be compensated at the set hourly rate for spending such time in schools.

Time Spent on Actively Informing or Engaging the Public on State Board Business: Members acting in an official capacity may be compensated for all time spent actively informing or engaging the public on State Board business. Examples are: meeting with constituents or stakeholders, speaking before a civic organization or empaneling a town hall meeting. The compensation for time spent with such entities shall not count toward the maximum 100 hours per year in schools or school facilities, even if those entities meet in schools or school facilities. There is no established maximum for time actively engaged with such entities.

Ohio State Board of Education, *Policies and Procedures Manual* (rev. ed. May 9, 2017), available at <http://education.ohio.gov/getattachment/State-Board/State-Board-Reports-and-Policies/Policies-Procedures-Manual.pdf.aspx?lang=en-US> (last visited June 5, 2019). The section provides further that members of the Board are to be “reimbursed if a personal automobile is used for travel at the current state rate per mile from the member’s residence to the place of the meeting or other business and return.” *Id.*

We also have been provided with a copy of a document entitled “Executive Committee Report Out” for a meeting held on April 8, 2019. It is our understanding that this report contains a summary of the proposed changes in the Board’s Policies and Procedures Manual, which you describe in your letter. The report makes reference to a memorandum which it is indicated was distributed to board members prior to the March meeting of the board, and which provides for “additional time” to be counted for the official duties of Board members. It is indicated that the recommendations for additional compensation hours include up to 144 hours for meeting preparation time and constituent services per year. Moreover, under the recommendations, certain Board members could count additional hours for compensation purposes. For example, the State Board Vice-President could count up to an additional 252 hours in compensable time per year and the State Board President could count up to an additional 280 hours in compensable time per year. The document indicates that “the report passed with a voice vote” and was contemplated as going to the full board in May. See Ohio Dep’t of Educ., *Minutes of the April 2019 Meeting of the State Board of Education*, at 17-18, available at <http://education.ohio.gov/getattachment/State-Board/State-Board-Meetings/State-Board-Meetings-for-2019/Apr-2019-MEETING-Minutes-Final.pdf.aspx?lang=en-US> (last visited June 5, 2019).

As you note in your letter, your question implicates Article II, Section 20 of the Ohio Constitution, which provides that “[t]he general assembly ... shall fix the term of office and compensation of all officers, and no change shall affect the salary of any officer during his existing term, unless the office be abolished.” Ohio Const. art. II, § 20. A previous Attorney General opinion has outlined the elements of public office, stating that

[t]he requisite elements of public office are: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3)

in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer.

1963 Op. Att’y Gen. No. 3548, p. 58, at 61. The indicia of public office are further set forth in *State ex rel. Landis v. Bd. of Comm’rs.*, 95 Ohio St. 157, 159, 115 N.E. 919 (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.

In 1985 Op. Att’y Gen. No. 85-036, then Attorney General Anthony J. Celebrezze made reference to 1980 Op. Att’y Gen. No. 80-050, in which it was indicated, on the basis of *Landis*, 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.” 1985 Op. Att’y Gen. No. 85-036, at 2-127. Based on the foregoing, it is evident that the voting members of the state board of education are “public officers” for the purposes of Article II, Section 20 of the Ohio Constitution. *Accord* 2018 Op. Att’y Gen. No. 2018-035, at 2-333. The prohibitions against in-term modifications of the salaries of such officials set forth in the Constitutional provision, therefore, are applicable to voting members of the board.

Article II, Section 20 is to be read broadly so as to prohibit 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.” 1985 Op. Att’y Gen. No. 85-036, at 2-127 to 2-128. The constitutional provision “prohibits an incumbent from receiving an increase in the number of dollars payable to the officer during his term.” *Id.* at 2-128 (citing 1979 Op. Att’y Gen. No. 79-102); see *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E. 2d 692 (1976); *State ex rel. Artmayer v. Bd. of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975).

It is our conclusion, therefore, that a member of the state board of education, as a public officer to which Article II, Section 20 of the Ohio Constitution is applicable, is prohibited from participating in an increase in compensation authorized during his or her current term. The constitutional prohibition applies even if the officer undertakes or is assigned additional duties which are “within the scope of the purposes and contemplation of the legislature” in the creation of the office. *Donahey v. State*, 101 Ohio St. 473, 477, 129 N.E. 591 (1920). The *Donahey* court explained that “[i]t is a familiar rule that when a public officer takes office he undertakes to perform all of its duties, although some of them may be called into activity for the first time by legislation passed after he entered upon his term.” *Id.* at 476. If an increase in compensation

involves duties or responsibilities which are “germane” and “incident” to the office, their assumption cannot serve as justification for an in-term increase in compensation. *Lewis v. State ex rel. Harrison*, 21 Ohio C.C. 410, at 411-412 (Cir. Ct. Hamilton County 1901). If the duties assigned fall within the scope of the office as enunciated when the incumbent undertakes the position, Article II, Section 20 is applicable, and the in-term increase in compensation relative to those duties is impermissible. *See State ex rel. Mikus v. Roberts*, 15 Ohio St. 2d 253, 257-258, 239 N.E.2d 660 (1968); 1980 Op. Att’y Gen. No. 80-073, at 2-293. It is evident that the proposed enhancements of the compensation to be allowed voting members of the Board emanate, not from legislative enactment modifying the duties and responsibilities of Board members, but from the unilateral action of the Board itself.

We note that the “Executive Committee Report Out” identified above indicates that the modifications in compensation at issue involve “additional time [which] should be counted for Board members official duties.” As such, the changes which are proposed involve no legislative addition to the duties and responsibilities of each member of the board, but only an increase in the number of hours for which each board member may be compensated for performing duties and responsibilities assigned and undertaken at the time he or she took office. On that basis, and on the basis of our analysis of the contemplated action, it is our opinion that members of the state board of education are public officers within the meaning of the restrictions and limitations set forth in Article II, Section 20 of the Ohio Constitution; that the proposed adjustments which are contemplated constitute a change in the compensation of the members of the board; and that an incumbent member of the board serving at the time of the adoption of any such changes may not participate in or benefit from such changes during his or her current term of service.

It is our opinion, therefore, and you are advised that, pursuant to Article II, Section 20 of the Ohio Constitution, if the State Board of Education amends its policies and procedures manual, as has been proposed, so as to increase the activities and number of hours for which voting members of the Board may be compensated, a board member may not take advantage of the increase unless the amended version of the manual was in effect at the start of the voting member’s current term of office.

Respectfully,



DAVE YOST
Ohio Attorney General