

poses to construct a boulevard on the old canal bed. Before any actual boulevard construction program can be arranged, the canal must be filled to bring it to a level with the banks.

Question: May the city's portion of the gasoline tax receipts be used for the purpose of filling the canal bed?"

In connection with your inquiry, it will be observed that Section 5537, General Code, which relates to the first gasoline tax, and Section 6309-2, General Code, which relates to the automobile license tax, were amended by the 88th General Assembly. Prior to said amendments, moneys derived from both of the sources above mentioned, could be expended by municipalities for the purpose of maintenance and repair. Under said amendments the language relating to the uses for which said receipts could be expended was changed, thereby enlarging the powers of municipalities to make such expenditures. The language now expressly authorizes the expenditure of such funds for the repairing, constructing and repaving of public streets or roads in municipalities. However, it is provided that not more than fifty per cent of such funds shall be used for construction and repaving.

Section 5548-1, General Code, as amended by the same Legislature, and which relates to the second gasoline tax, expressly provides that the proceeds thereof may be used by municipalities for the purpose of constructing, widening, reconstructing and maintaining their public highways, roads and streets and to supplement revenue already available for such purpose.

From the foregoing it will readily be seen that both of the gasoline taxes to which you refer, may be used for the purpose of constructing streets. There certainly can be no argument but that before a street is constructed, in many instances, a necessary fill should be made in order to bring the surface of the road, when completed, to the proper elevation to accommodate the traffic and to provide a sufficient drainage system. In other words, filling is just as essential as grading out under modern engineering practices in connection with road construction.

In the situation you present it can readily be imagined that a road would be very desirable located at an elevation similar to that of the banks of the canal, whereas it would be undesirable if it were constructed in the bed of the canal.

If the canal which you mention has properly been dedicated as a boulevard and it is the intention of the municipality to improve the same as a public street, it is my opinion that, if in the judgment of the engineers in charge it is essential to fill in the canal bed as an incident to a street construction project, the receipts from the gasoline tax may be properly used for said purpose.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1256.

ELECTION BOARD MEMBERS—COMPENSATED ACCORDING TO PROVISIONS OF NEW ELECTION LAW AFTER JANUARY 1, 1930.

SYLLABUS:

Members of boards of deputy supervisors and inspectors of elections who continue in office after January 1, 1930, under Section 4785-8, General Code, as members of the newly

created boards of elections, must be compensated on the basis provided in Section 4785-18, General Code.

COLUMBUS, OHIO, December 4, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

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

“You are respectfully requested to furnish this department with your written opinion upon the following:

Senate Bill No. 2, enacted at the recent session of the General Assembly, codifies the election laws of the state, and provides that the act shall become effective January 1st, 1930. Section 8 of the act provides for the appointment by the Secretary of State of members of county boards of election and that two members of said board shall be appointed on the first day of May in even numbered years and the term is four years; the section further provides that members of the present boards of deputy state supervisors and inspectors of elections and deputy state supervisors of elections shall continue to act as such for the terms for which they were appointed and until their successors have been chosen and have qualified as herein provided. Section 18 of the act fixes the annual compensation of the members of the board.

Question: May the present members of the boards of deputy inspectors and supervisors of elections, and deputy supervisors of elections receive the compensation fixed by this act, beginning with the effective date of the act or will they be required to serve under the laws as to their compensation which were in effect at the time of their appointment until their successors are elected and qualified?”

Your question rests upon the provisions of Section 20, Article II of the Constitution, which reads 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.”

Section 4785-8, General Code, which becomes operative January 1, 1930, and to which you refer in your inquiry, reads:

“There shall be in each county of the state, a board of elections consisting of four qualified electors of the county, who shall be appointed by the Secretary of State to serve for the term of four years and until their successors have been appointed and have qualified. On the first day of May in even numbered years the Secretary of State shall appoint two of such board members, one of whom shall be from the political party which cast the highest number of votes in the state for the office of Governor at the last preceding state election, and the other shall be from the political party which cast the next highest vote for Governor at such election. The members of the present boards of deputy state supervisors of elections and members of the boards of deputy state supervisors and inspectors of elections shall continue to act and be recognized as such for the terms for which they were appointed, and until their successors have been chosen and have qualified as herein provided. All vacancies filled for unexpired terms and all appointments to new terms shall be made from the political party to which the vacating or outgoing member belonged, unless there is a third political party which

cast a greater number of votes in the state at the last preceding state election for the office of Governor than did the party to which the retiring member belonged, in which event the vacancy shall be filled from such third party."

Section 4785-18, of the new election code, which also becomes operative January 1, 1930, reads as follows:

"The annual compensation of members and clerks of the boards of elections shall be determined on the basis of the population of the county according to the next preceding federal census, and shall be paid monthly out of the appropriations made to the board of elections and upon vouchers or payrolls certified by the chairman, or a member of the board designated by it, and countersigned by the clerk or in his absence by the deputy clerk. Upon presentation of any such voucher or payroll the county auditor shall issue his warrant upon the county treasurer for the amount thereof as in the case of vouchers or payrolls for county offices and the treasurer shall pay the same

The amount of annual compensation of members of the board shall be as follows: twelve dollars for each full one thousand of the first one hundred thousand population; eight dollars for each full one thousand of the second one hundred thousand population; six dollars for each full one thousand of the third one hundred thousand; four dollars for each full one thousand of the fourth one hundred thousand; and three dollars for each full one thousand above four hundred thousand; except that in counties containing a registration city or cities an additional compensation of two dollars for each full one thousand population in such cities shall be allowed; provided, however, that the compensation of a member of the board shall be not less than two hundred dollars and shall not exceed four thousand two hundred dollars annually."

The latter section, together with Section 4785-19, General Code, controlling compensation of clerks of boards of elections replaces present Sections 4822, 4942, 4943 and 4990, General Code, and provides a change in the basis of compensation of board members.

Under the present law, members of boards of elections are compensated on the basis of the number of precincts in their jurisdictions. By Section 4822, General Code, each member is allowed three dollars per year for each precinct; by Section 4942, General Code, each member in counties containing registration cities, is allowed five dollars per year for each election precinct in such cities; by Section 4943, General Code, it is provided that the maximum annual compensation of members under Sections 4822 and 4942, shall be \$1,800, \$1,500, \$1,200, \$1,100 or \$300, according to population. By Section 4990, General Code, each member is allowed an additional two dollars per precinct per annum for primary elections. The latter provision has been interpreted as meaning two dollars per annum per precinct for each primary.

Under Section 4785-18, supra, the basis of compensation is changed from precincts to population.

Consideration will first be given to the nature of compensation which is received by deputy state supervisors and inspectors of elections, and deputy state supervisors of elections under present statutes in order to determine whether it is salary or compensation.

It must be observed that these persons do not receive a fixed and definite salary for services rendered during a fixed term, but receive compensation, based upon the number of precincts in the county and registration cities, or in other words, they receive a compensation to be determined by the services they render. The greater

the number of precincts in any county and in any registration city in the county, the greater would be the services rendered by members of the board.

In Opinions of the Attorney General for 1918, Vol. II, page 1567, it is said:

"In *State ex rel. Taylor vs. Carlisle, et al.*, 3 O. N. P. (N. S.) 544, the court was passing upon a question somewhat similar to the one now under consideration. In that case the Legislature had increased the compensation of county commissioners of Franklin County from \$2,000.00 to \$3,500.00 per annum. The compensation of the county commissioners for any one year was to be determined by the amount of the tax duplicate in each county for real and personal property. Judge Evans, in rendering the opinion in this case, held that this did not come within the inhibition of Section 20, Article II, of the Constitution, upon two grounds, viz., because the law under which the county commissioners had formerly drawn compensation was unconstitutional and void and hence in reality there was no law fixing the compensation of county commissioners until the amended act was passed. This practically disposed of the case, but Judge Evans went further and made the following suggestion in the opinion (p. 548):

'Another consideration of this question is whether the amended act of 1904 provides for a salary such as comes within the inhibition of said Article II, Section 20 of the Constitution.

The act does not provide for any definite fixed salary. The compensation depends on the aggregate of the tax duplicate from year to year. It may be less one year and greater another, depending on the variation of the tax duplicate, and the amount from one year to another can not be determined until December of each year when the aggregate is ascertained.'

He based this statement upon the holding of our Supreme Court in *Thompson, ex rel. vs. Phillips*, 12 O. S. 617. In this case the court was passing upon the question we have before us, as it pertained to a county auditor whose compensation was not a fixed sum for a definite period of time, but was based upon the tax duplicate—that is, on the amount of services rendered by the county auditor in any one year. This was a per curiam opinion and reads as follows (pages 617-8):

'The relator, to show that he is not affected by the act of April 9, 1861, relies on the following section of the Constitution:

'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.' Section 20, Article II.

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 services rendered. Where the compensation, as in this case, is to be ascertained by a percentage on the amount of money received and disbursed, we think it is not a salary within the meaning of the section of the Constitution."

In the opinion from which I have just quoted, the Attorney General had before him the question of whether the maximum compensation of members of boards of supervisors of elections which had been increased during their terms of office could be drawn by incumbents. In answering in the affirmative, the Attorney General pointed out that:

"These persons do not receive a fixed and definite salary for services rendered during a fixed term * * * but receive a compensation to be determined by the services they render."

In view of the foregoing discussion, and especially the two cases cited by the former Attorney General, it is my view that boards of deputy state supervisors of elections and boards of deputy state supervisors and inspectors of elections do not come within the prohibition of Section 20, Article II, *supra*.

Whatever the method of remuneration of boards of elections under Section 4785-18, *supra*, be it compensation or salary, it cannot be considered an increase or decrease in "salary" as the present method of remuneration is compensation.

If deputy state supervisors who hold over after January 1, 1930, as members of boards of elections, by virtue of Section 4785-8, General Code, can not draw compensation, as provided in Section 4785-18, General Code, there would apparently exist no authority for them to draw any compensation whatsoever for their services, as Sections 4822, 4942, 4943 and 4990, General Code, under which they are now paid, cease to exist on December 31, 1929, through repeal by the General Assembly.

Specifically answering your question, therefore, I am of the opinion that members of boards of deputy supervisors and inspectors of elections who continue in office after January 1, 1930, under Section 4785-8, General Code, as members of the newly created boards of elections, must be compensated on the basis provided in Section 4785-18, General Code.

Respectfully,

GILBERT BETTMAN,

Attorney General.

1257.

BOARD OF EDUCATION—CONTRACTING FOR EXCLUSIVE RIGHT TO SCHOOL BUS WITHOUT BECOMING OWNER—REGISTERING SUCH VEHICLE WITHOUT CHARGE AUTHORIZED—EFFECT OF AMENDED SECTION 7600, GENERAL CODE, UPON DISTRIBUTION OF 2.65 MILLS TAX LEVY.

SYLLABUS:

1. A board of education lawfully may contract for the exclusive use of a school bus for a definite time without purchasing the bus and thus becoming the owner thereof.

2. For the purposes of registration of a motor vehicle as required by Sections 6290, *et seq.* of the General Code, a person who is entitled to the exclusive use of such vehicle for a period of greater than thirty consecutive days will be considered the owner thereof.

3. A motor vehicle owned by a board of education, or one which the board of education has the exclusive right to use for a period of greater than thirty consecutive days, and which is used for no other purpose than the transportation of school pupils may be registered as provided by Section 6295, General Code, without charge of any kind.

4. It cannot be said that the effect of the amendment of Section 7600, General Code, by the 88th General Assembly, is to make it discretionary with a county superintendent of schools or a county board of education as to the amount of the funds received from the 2.65 mills tax levy provided for by Section 7575, General Code, which may be distributed to each school district. Said amended section does, however, repose in a county board of education