

## OPINION NO. 89-087

## Syllabus:

1. Ohio Const. art. II, §20 prohibits a mid-term county commissioner from receiving the salary increase provided in R.C. 325.18 by the enactment of Am. S.B. 452, 117th Gen. A. (1988) (eff. Dec. 15, 1988), regardless of the fact that the county board of commissioners does not determine its own compensation.
2. When, pursuant to R.C. 124.85, a county commissioner is ineligible for membership in the public employees retirement system (PERS), the county has no authority to pay directly to that commissioner an amount equivalent to what would have been the county's employer contribution to PERS as calculated pursuant to R.C. 145.12 and R.C. 145.51.

To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, November 3, 1989

I have before me your request for my opinion regarding the compensation and benefits of county commissioners. Based upon the facts and issues presented in your letter, your specific questions can be stated as follows:

1. Do the statutory and constitutional provisions governing the salary of county commissioners permit a mid-term commissioner to receive the salary increase recently enacted by the legislature, based upon the fact that the legislature, not the county board of commissioners, is the party which determines the compensation?
2. When a county commissioner is ineligible for membership in the public employees retirement system (PERS), may the county pay directly to that commissioner an amount equivalent to what would have been the county's employer contribution to PERS with respect to that commissioner?

Your first question, regarding the permissibility of an in-term increase in the salary of a county commissioner, is governed by the provisions of Ohio Const. art II, §20, which 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.

A county commissioner is a public officer within the meaning of Ohio Const. art. II, §20, and thus is constitutionally prohibited from receiving any salary increases enacted by the legislature during his existing term of office. See *State ex rel. DeChant v. Kelsner*, 133 Ohio St. 429, 14 N.E.2d 350 (1938) (applying Ohio Const. art. II, §20 to a county commissioner).

I note, as a preliminary matter, that Ohio Const. art. II, §20 does not prohibit increases which occur automatically by application of a statutory formula established prior to the commencement of the term of the public officer involved. *State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 39 N.E.2d 840 (1942) (syllabus, paragraph three); accord *Schultz v. Garrett*, 6 Ohio St.3d 132, 451 N.E.2d 794 (1983)(syllabus). The salary increase to which you refer is not such a permissible increase. As a result of the passage of Am. S.B. 452, 117th Gen. A. (1988) (eff. Dec. 15, 1988), R.C. 325.18(A)(5) now provides that the annual

compensation of a county commissioner for calendar year 1990, shall be the commissioner's compensation for 1989 increased by five percent.<sup>1</sup> Prior to the passage of Am. S.B. 452, the county commissioners compensation for years after 1988 was fixed at the amount paid in 1988, because R.C. 325.18(A)(4), as then in effect, provided that "in calendar year 1988 *and thereafter*" (emphasis added) commissioners would be paid their 1987 compensation increased by five percent. See 1983-1984 Ohio Laws, Part II, 4954 (Am. Sub. H.B. 897, eff. Dec. 26, 1984). Thus, by passing Am. S.B. 452, the legislature has established a new formula for computing the salary of the county commissioners in years subsequent to 1988. Pursuant to Ohio Const. art II, §20 and the court's rulings in *Guckenberger* and *Schultz*, this new formula may be applied only to those commissioners whose terms began after December 15, 1988 (the effective date of Am. S.B. 452).

By its own terms, Ohio Const. art. II, §20 applies to public officers whose compensation is set by the legislature. Thus, the fact that a county board of commissioners has no direct legislative control over its members' compensation has no bearing on the application of Ohio Const. art II, §20. The purpose of the prohibition of in-term increases in compensation is not to prevent public officers from raising their own salaries.<sup>2</sup> As explained by the Ohio Supreme Court, the purpose of prohibiting the legislature from making in-term changes in the salaries of other public officials is to make sure that the electors and public officer can predict what the salary for the particular position will be, to prevent the official from using personal influence or official actions to pressure the legislature for a salary increase, and to protect the official from legislative or popular threats to reduce his or her salary. *Guckenberger*, 139 Ohio St. at 278, 39 N.E.2d at 843 (1942).<sup>3</sup> I conclude, therefore, that Ohio Const. art. II, §20 prohibits a mid-term county commissioner from receiving the salary increase provided in R.C. 325.18 through enactment of Am. S.B. 452, 117th Gen. A. (1988) (eff. Dec. 15, 1988), regardless of the fact that the county board of commissioners does not determine its own compensation.

Your second question concerns the compensation of a county commissioner who is ineligible for PERS membership. You state that the commissioner in question is a retired teacher collecting retirement benefits from the state teachers retirement fund (STRS). She is prohibited from establishing membership in PERS subsequent to her retirement from STRS. R.C. 124.85 ("[n]o person who is receiving a disability benefit or service retirement pension or allowance from any state or municipal public retirement system in Ohio, shall be eligible for membership in any other state or municipal retirement system of this state").<sup>4</sup> The employer contribution to PERS is paid from public funds, R.C. 145.12, and its amount is calculated as a percentage of the earnable salary of all the members of PERS working for the particular employer. R.C. 145.48. Thus, for those county commissioners who are members of PERS, the county is required to make an employer contribution to PERS, fixed at a certain percentage of their salaries. Since the commissioner in your question is not a member of PERS, the county is not required to make an employer contribution to PERS with respect to that

---

<sup>1</sup> R.C. 325.18(A)(6)-(8) and (C) further provide that a county commissioner's compensation will continue to increase annually by five per cent of the preceding year's compensation, through the year 1994.

<sup>2</sup> Cf. Ohio Const. art. II, §31 (preventing members of the general assembly from legislating in-term changes in their own compensation).

<sup>3</sup> The constitutional provision considered in *Guckenberger* concerned only judges. However, the court itself noted that the prohibition of Ohio Const. art. II, §20 is "almost identical." *State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 279, 39 N.E.2d 840, 843 (1942).

<sup>4</sup> I note that certain exceptions to the prohibitions of R.C. 145.85 apply to elective officials. See, e.g., R.C. 145.202; R.C. 145.381. I understand from your letter and information provided by a member of your staff that none of these exceptions apply to the commissioner in question.

commissioner. You ask whether the county may, instead, pay an equivalent amount of money directly to the commissioner.

It is a well established principle that a board of county commissioners, being a creature of statute, may exercise only those powers expressly conferred on it by statute or necessarily implied therefrom. *See, e.g., State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). Particularly in financial transactions, county commissioners may act only where their authority is clear and is distinctly granted. *See, e.g., State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916). Therefore, I must examine the statutes governing the employer contribution to PERS in order to answer your question.

Membership in and funding of the public employees retirement system is governed by R.C. Chapter 145. Pursuant to R.C. 145.12, the board of county commissioners is required to appropriate sufficient funds to pay the employer contribution to PERS. R.C. 145.51 requires the county to pay this amount into the employers' accumulation fund of PERS.<sup>5</sup> There is clearly no express authority in these statutes for the commissioners to appropriate funds for or to pay an equivalent amount to a non-member employee.

Nor can I find any basis for implying such authority. Monies paid by the county into the "employers' accumulation fund" pursuant to R.C. 145.51 do not stand to the credit of any particular member or employer. The money remains in the fund regardless of whether a particular member leaves PERS and withdraws his or her individual contributions. Neither the county nor the member receive any refund of the employer contribution. *See* R.C. 145.23.

I note further that, although the amount paid by an employer is calculated as a percentage of the salaries of employees who are PERS members, R.C. 145.12; R.C. 145.48, this calculation is simply a mechanism for distributing the public cost of the system equally among public employers. The employers' rate is based upon the actuarial needs of PERS for the current year, regardless of the particular characteristics of the employer or the individual employees. R.C. 145.48. The potential benefit accruing to an individual does not differ based on the employer contribution. Thus, it can be seen that the purpose of the statutorily required employer contribution to PERS is not to add to the compensation of the individual with respect to whom the contribution is made. Rather, it is intended for the benefit of public employees as a group. *See* 1980 Op. Att'y Gen. No. 80-002, pp. 2-16 to 2-17 (employer contribution to PERS does not constitute compensation for purposes of Ohio Const. art. II, §20).

My conclusion that the employer contribution to PERS is not part of the compensation of a public employee is further supported by the treatment of elective officials with respect to PERS. Elective officials are not required by law to become members of PERS,<sup>6</sup> and, as a general rule, may elect to join the system or not, pursuant to R.C. 145.20. Yet the legislature has made no provision for shifting the amount of the employer's PERS contribution into the direct compensation of those individuals who choose voluntarily not to join PERS. Since the legislature chose not to make any adjustment in the compensation of such individuals, it does not appear that the legislature considered the employer contribution to PERS to be money to which those elected officials had any individual entitlement. *See generally Lake*

---

<sup>5</sup> PERS monies are held in one of six funds created by R.C. 145.23: the employees' savings fund, the employers' accumulation fund, the annuity and pension reserve fund, the income fund, the expense fund, or the survivors' benefit fund.

<sup>6</sup> Elected officials are expressly excluded from the definition of public employee found at R.C. 145.01(A), and, therefore, not covered by the compulsory membership requirement of R.C. 145.03. *See* 1956 Op. Att'y Gen. No. 6357, p.213.

*Shore Ry. v. Public Util. Comm'n*, 115 Ohio St. 311, 319, 154 N.E. 239, 249 (1926) (legislative silence viewed as an indication of legislative intent).

I am aware that in your case, the commissioner is statutorily prohibited from joining PERS. *See* R.C. 124.85. This prohibition, however, is not equivalent to an involuntary forfeiture of the state's contribution to her retirement. The commissioner is already receiving benefits from STRS, which is also a state retirement system.<sup>7</sup> As in PERS, the state has allocated its share of the cost of the retirement system among the public employers involved by means of a required employer contribution. The employer contribution to STRS is calculated and utilized in the same manner as the employer contribution to PERS. *Compare* R.C. 3307.53; R.C. 3307.56; R.C. 3307.65 with R.C. 145.48; R.C. 145.12 and R.C. 145.51; R.C. 145.23. Therefore, to the extent that the commissioner is entitled to state support of her retirement, she has already received it and is currently collecting the benefits resulting therefrom. The state's obligation with respect to the other commissioners is not yet complete. In light of the foregoing, there is no basis for implying any authority to pay an amount equal to the employer contribution to PERS directly to the ineligible commissioner.

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

1. Ohio Const. art. II, §20 prohibits a mid-term county commissioner from receiving the salary increase provided in R.C. 325.18 by the enactment of Am. S.B. 452, 117th Gen. A. (1988) (eff. Dec. 15, 1988), regardless of the fact that the county board of commissioners does not determine its own compensation.
2. When, pursuant to R.C. 124.85, a county commissioner is ineligible for membership in the public employees retirement system (PERS), the county has no authority to pay directly to that commissioner an amount equivalent to what would have been the county's employer contribution to PERS as calculated pursuant to R.C. 145.12 and R.C. 145.51.

---

<sup>7</sup> STRS is governed by the provisions of R.C. Chapter 3307. Other state retirement systems are the school employees retirement system, R.C. Chapter 3309, the police and firemen's disability and pension fund, R.C. Chapter 742, and the highway patrol retirement system, R.C. Chapter 5505.