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1. SALARY—ANY CHANGE BY GENERAL ASSEMBLY SHALL NOT AFFECT SALARY OF ANY OFFICER DURING HIS EXISTING TERM — ARTICLE II, SECTION 20, CONSTITUTION OF OHIO.
2. DIRECTOR OF HEALTH—APPOINTED FOR FIVE YEAR TERM—AN OFFICER—SECTION 154-12 GC.
3. GOVERNOR—AUTHORIZED TO FILL VACANCY, EXISTING OFFICE, DIRECTOR OF HEALTH, WHICH ARISES WHEN SENATE NOT IN SESSION—SECTION 12 GC.
4. WHEN GOVERNOR FILLS VACANCY—OFFICER, DIRECTOR OF HEALTH, BY APPOINTMENT WHEN SENATE NOT IN SESSION—APPOINTEE, CONFIRMED BY SENATE, NEXT REGULAR SESSION, DOES NOT ASSUME NEW TERM OF OFFICE—CONTINUES TO HOLD OFFICE FOR FULL TERM TO WHICH HE WAS PREVIOUSLY APPOINTED—SECTION 12 GC—ARTICLE II, SECTION 20, CONSTITUTION OF OHIO.
5. INCUMBENT, DIRECTOR OF HEALTH—INCREASE IN SALARY NOT APPLICABLE—EVEN THOUGH CONFIRMED BY SENATE—HE NOW IS AND WILL CONTINUE TO BE INCUMBENT OF FULL TERM OF OFFICE, FIVE YEARS FROM AUGUST 1, 1952 TO JULY 31, 1957—SECTIONS 2250, 154-12 GC, AMENDMENTS, AMENDED HB 94, 100 GA, EFFECTIVE JULY 13, 1953.

SYLLABUS:

1. Under the provisions of Article II, Section 20, Constitution of Ohio, any change by the General Assembly in the salary of an officer shall not affect the salary of any officer during his existing term.

2. The director of health, being appointed for a five year term by virtue of Section 154-12, General Code, is an officer within the purview of Article II, Section 20, Constitution.

3. By virtue of the provisions of Section 12, General Code, the governor is authorized to fill a vacancy existing in the office of the director of health which arises when the Senate is not in session.

4. When the governor fills a vacancy in the office of the director of health by appointment made during the time the Senate is not in session, such appointee, upon confirmation by the Senate at its next regular session, does not assume a new term of office within the meaning of Article II, Section 20, Constitution, but, in accordance with the provisions of Section 12, General Code, continues to hold the office for the "full term" to which he was thus previously appointed.

5. By virtue of the provisions of Article II, Section 20, Constitution, the increase in salary provided by the amendments of Sections 2250 and 154-12, General Code, by the enactment of Amended House Bill No. 94, of the 100th General Assembly, effective July 13, 1953, will not be applicable to the incumbent director of health, even though confirmed by the Senate after the effective date of such amendments, in view of the fact that he now is, and will continue to be the incumbent of a full term of office of five years from August 1, 1952 to July 31, 1957.

Columbus, Ohio, July 30, 1953

Mr. W. H. Veigel, Secretary, Public Health Council
State of Ohio, Department of Health
Columbus, Ohio

Dear Sir :

I have before me your request for my opinion as follows :

“Dr. John D. Porterfield’s term as Director of Health expired on July 31, 1952.

“On June 16, 1952 the Public Health Council, in compliance with the provisions of Section 154-4 of the General Code, certified an eligible list of names to the Governor, from which the Governor on July 15, 1952 reappointed Dr. Porterfield as Director of Health for a term to begin on August 1, 1952, and to end July 31, 1957.

“Dr. Porterfield accepted reappointment to the office of Director of Health and executed the Oath of Office before a notary public on July 18, 1952. The Governor’s nomination of Dr. Porterfield for reappointment to a five-year term beginning on August 1, 1952, was submitted to the Senate for confirmation on July 13 of this year and was referred to the Rules Committee. Presumably the Senate will act on his confirmation Friday, July 31, 1953.

“Amended House Bill No. 94, which increases the salary of the Director of Health from \$8,600 to \$12,000 per year was passed by both Houses of the General Assembly as emergency legislation and the engrossed bill was signed by the Governor and became effective July 13, 1953.

“I should like to receive your opinion and advice on the following question :

‘Is Dr. Porterfield, the present incumbent of the office of Director of Health, entitled to receive the increase in salary authorized by the enactment of Amended House Bill No. 94?’ ”

Prior to July 13, 1953, Section 2250, General Code, as last amended, effective February 9, 1951, read in pertinent part:

"The annual salaries of the appointive state officers and employees herein enumerated shall be as follows: * * *

Department of health.

Director of health, six thousand five hundred dollars.

"* * * For the period beginning with the effective date of this act and ending on June 30, 1953, or in the event there are any unexpired terms on said date said period shall continue for each of said terms until the expiration date thereof, the annual salary of the superintendent of public works as director of public works, the superintendent of public instruction as director of education and the director of health shall be eight thousand six hundred dollars."

As amended by Amended House Bill No. 94, effective July 13, 1953, Section 2250, General Code, now contains no reference to the director of health. Instead, Section 154-12, General Code, was amended by adding a sentence providing that the annual salary of the director shall be twelve thousand dollars.

The basic question presented by your letter is whether, in view of the provisions of Article II, Section 20, of the Ohio Constitution, the present incumbent of the office of director of health may receive the increase in pay provided by the recent amendments of Sections 2250 and 154-12. This constitutional provision reads:

"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."
(Emphasis added.)

It is now well established that this constitutional provision applies to appointive offices as well as to elective offices. *State, ex rel. McNamara v. Campbell*, 94 Ohio St., 403; *Donahey v. State ex rel. Marshall*, 101 Ohio St., 473; *State, ex rel. Glander v. Ferguson*, 148 Ohio St., 581.

It is clear that the director of health is appointed for a term of office. This is true today under existing legislation and was true at the time Dr. Porterfield was reappointed to the office of director of health by the Governor on July 15, 1952. Section 154-12, General Code, reads:

“The director of health shall be a physician holding the degree of doctor of medicine from a medical college approved by the state medical board and who, before assuming his duties, shall have been licensed to practice medicine in the state of Ohio. He shall have had experience in pursuing some phase of medical practice, and additional experience in public health administration. *The term of office of the director of health shall be five years* and he shall be removed only for incompetence or gross neglect of duty. The annual salary of the director shall be twelve thousand dollars.” (Emphasis added.)

As noted before, the only change made in Section 154-12 by the recent amendment was to add the last sentence relative to the salary of the director.

It would seem clear, therefore, that the recent increase in the salary of the director of health would be a change affecting “the salary of any officer during his existing term,” as applied to the incumbent director, and thus would be specifically forbidden by Article II, Section 20, of the Constitution, unless Dr. Porterfield could be said to enter upon a *new term* of office upon confirmation by the Senate. It is necessary, therefore, to inquire into the legal status of the director prior to Senate confirmation.

The office of the director of health is created by Section 154-3, General Code. By the terms of Section 154-4, General Code, the director of health is appointed by the Governor by and with the advice and consent of the Senate from a list giving the names and qualifications of not less than six physicians, which list has been certified to him by the Public Health Council.

The Senate, of course was not in session in July or August, 1952 to give its “advice and consent.” Such contingency is governed by Section 12, General Code, which reads:

“When a vacancy in an office filled by appointment of the governor, with the advice and consent of the Senate, occurs by expiration of term or otherwise during a session of the senate, the governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the senate, and, if the senate advise and consent thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made.”

You will note that where a vacancy in an office filled by appointment by the Governor, with the advice and consent of the Senate, occurs during a session of the Senate, both the appointment by the Governor and the advice and consent of the Senate are required in order to fill the vacancy. On the other hand, when the vacancy occurs when the Senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the Governor alone is authorized to fill the vacancy, subject to confirmation or rejection by the Senate at its next session. This latter procedure is commonly spoken of as a "recess appointment."

It will be observed that by the terms of Section 12, the appointee does not assume a "new" term after confirmation. Instead, this section provides that if confirmed at the next session of the Senate, the appointee "shall hold office for the full term." This language would clearly appear to have reference to the "full term" to which the person had already been appointed by the Governor, in this case, the term beginning August 1, 1952 and ending July 31, 1957. The submission by the Governor of the name of Dr. Porterfield to the Senate gave full recognition to this fact. Note that the confirmation is sought not for a term of five years beginning at some date subsequent to July 13, 1953, but for the five year term beginning August 1, 1952 and ending July 31, 1957.

Note further that under Section 12, no additional appointment by the Governor is required subsequent to the "recess appointment" unless the Senate at its next session does not "advise and consent thereto," in which event "a new appointment shall be made."

I am lead, therefore, to the inevitable conclusion that if confirmed by the Senate on July 31, 1953, Dr. Porterfield will not assume a new term of office, but instead will merely continue as the lawful incumbent of the "full term" to which he was appointed by the Governor on July 15, 1952.

Some additional reference to the case, *State, ex rel. Glander v. Ferguson*, 148 Ohio St., 581, probably should be made in order to illustrate the fact that such case is completely distinguishable from the facts here under consideration. That case involved the application of Article II, Section 20, to the salaries of the tax commissioner and a member of the public utilities commission. Since the basic facts involving the salaries of each of these officers was similar, I shall limit my discussion to the status of the tax commissioner.

The original term of Mr. Glander, as tax commissioner, ended on the second Monday in February 1947. It will be noted, therefor, that the vacancy in such office occurred during a session of the Senate and not, as here, when the Senate was not in session. The Governor reappointed Mr. Glander as tax commissioner on June 30, 1947 for a term to begin on July 1, 1947 and end on the second Monday in February 1951. Such appointment was confirmed by the Senate that same day.

In the meantime, the General Assembly had enacted legislation which increased the salary of the tax commissioner, which legislation became effective on June 23, 1947. Thus, both the appointment and the confirmation of Mr. Glander to the new term occurred subsequent to the effective date of the legislation increasing the pay of the tax commissioner.

The issue involved in that case was whether during the interim from the second Monday in February 1947, until the new appointment and confirmation on June 30, 1947, Mr. Glander was occupying the same term of office as he continued to occupy subsequent to the reappointment and confirmation. The Supreme Court held that he was not, and held that the provisions of Article II, Section 20, applied "strictly to the term to which the officer is appointed or elected, and not to the period constituting the statutory term of the office."

Had no reappointment occurred at the termination of Dr. Porterfield's prior term of office which ended July 31, 1952, it would appear that by the provisions of Section 8, General Code, he would have continued to hold office until his successor was appointed and qualified. In the Glander case, it was held that Mr. Glander continued to hold office from the second Monday in February 1947 until June 30, 1947 by virtue of this statute. Here, however, pursuant to the authority given him by Section 12, General Code, the vacancy was filled by appointment by the Governor on July 15, 1952. It is clear, therefore, that since August 1, 1952 Dr. Porterfield has been holding office by virtue of the appointment of July 15, 1952 and not, as in the Glander case, by virtue of holding over from a previous term of office.

In conclusion it is my opinion:

1. Under the provisions of Article II, Section 20, Constitution, any change by the General Assembly in the salary of an officer shall not affect the salary of any officer during his existing term.

2. The director of health, being appointed for a five year term by virtue of Section 154-12, General Code, is an officer within the purview of Article II, Section 20, Constitution.

3. By virtue of the provisions of Section 12, General Code, the governor is authorized to fill a vacancy existing in the office of the director of health which arises when the Senate is not in session.

4. When the governor fills a vacancy in the office of the director of health by appointment made during the time the Senate is not in session, such appointee, upon confirmation by the Senate at its next regular session, does not assume a new term of office within the meaning of Article II, Section 20, Constitution, but, in accordance with the provisions of Section 12, General Code, continues to hold the office for the "full term" to which he was thus previously appointed.

5. By virtue of the provisions of Article II, Section 20, Constitution, the increase in salary provided by the amendments of Sections 2250 and 154-12, General Code, by the enactment of Amended House Bill No. 94, of the 100th General Assembly, effective July 13, 1953, will not be applicable to the incumbent director of health, even though confirmed by the Senate after the effective date of such amendments, in view of the fact that he now is, and will continue to be the incumbent of a full term of office of five years from August 1, 1952 to July 31, 1957.

Respectfully submitted,

C. WILLIAM O'NEILL

Attorney General