

"We think the compensation in the case at bar comes within the principle of the case cited, although a per diem compensation. It is not, within the meaning of the section quoted, 'salary'. Hence, an increase in the pay of a member during his term, is not prohibited by the constitution."

It may be said in considering this case that the Supreme Court has followed the Thompson case, *supra*, in that a payment dependent on the time alone is not sufficient to constitute such payment as salary, but that the payment must also not be dependent on the amount of the service rendered.

As heretofore indicated, there is no question but that the payment to members of the boards of elections is payment dependent upon the time of the service, it being an annual payment, but there is a very serious question as to whether or not this payment is dependent upon the amount of the service rendered. I am of the view that a provision for compensation of members of boards of elections based upon the population as determined by the next preceding federal census in which no reference is made to any specific federal census is payment dependent upon the amount of services rendered.

Specifically answering your question, I am of the opinion that in the event the 1930 federal census is completed in the latter part of the year 1930, the compensation of members of the boards of elections for the year 1931 should be determined as provided in Section 4785-18, General Code, on the basis of the population of the county according to the 1930 census.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

1507.

#### ADJUTANT GENERAL—RIGHT TO EMPLOY PRIVATE ARCHITECT IN CONNECTION WITH ARMORY CONSTRUCTION.

##### SYLLABUS:

*The Adjutant General may employ an independent architect under the provisions of Section 2314 of the General Code to perform the services as required in said section in connection with the construction of an armory.*

COLUMBUS, OHIO, February 8, 1930.

HON. A. W. REYNOLDS, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—Your recent communication reads:

"It is respectfully requested that an opinion be rendered the Adjutant General's Department as to the legality of employing an architect under the provision of Section 2314 of the General Code, to perform architectural services as therein required in connection with the construction of the Berea armory. The cost of said services in the amount of \$2,825.00 is to be paid from Armory Fund, Additions & Betterments.

It is proposed to expend \$50,000.00 for the construction of said armory as authorized by Section 5242 of the Ohio Military Code, and the expense of said architectural service is to be charged as a part of the cost of said construction.

The Adjutant General's Department has a full time architect, but due to the fact that there are five new armories to be built this year, and a great many repairs on old armories are needed, there is not sufficient time for one man to complete the whole building program."

In examining the statutes it will be observed that the construction of armories comes under the jurisdiction of the Adjutant General and the Director of Public Works has no authority in such constructions.

Section 5238, General Code, defines the duties of the Adjutant General in connection with armories in the following language:

"The Adjutant General shall be the director of state armories. He shall provide grounds, armories and other buildings for the purpose of drill and for the safe keeping of arms, clothing, equipment and other military property issued to the several organizations of the national guard, and may purchase or build suitable buildings for such purposes when, in his judgment, it is for the best interest of the state so to do. He shall provide for the management, care and maintenance of such grounds, armories and buildings and may adopt and prescribe such rules and regulations for the management, government and guidance of the organizations occupying them as may be necessary and desirable."

While Section 154-40 of the General Code, as enacted in 1921, as a part of the administrative code, transferred the functions of constructing public buildings, etc., to the Department of Highways and Public Works, (which section was later amended so as to place said power in the Department of Public Works) this section contained a proviso which reads as follows:

"Nothing in this section or in Sections 154-37 or 154-41 of the General Code shall interfere with the power of the Adjutant General to purchase military supplies, or with the custody by the Adjutant General of property leased, purchased or constructed by the state and used for military purposes, or with the functions of the Adjutant General as director of state armories."

By reason of the proviso above mentioned it seems clear that the functions of the Adjutant General to construct armories were not transferred by the administrative code.

By the terms of Section 5242 of the General Code, the maximum amount that may be expended for an armory is fifty thousand dollars, and Section 5240, General Code, provides:

"He shall be governed in the construction of armories and other buildings for military purposes by the provisions of Chapter 1, Title IX, of Part First of the General Code."

Title IX of Chapter 1, referred to in the section last quoted, embraces Sections 2314, et seq., to which you refer. Section 2314 expressly authorizes the employment of architects for the purposes therein mentioned, which of course, includes the construction of armories.

Prior to the adoption of the administrative code of 1921, the general practice was to employ private architects in connection with the construction of any public buildings. Since the adoption of the administrative code, frequently architects have been

employed for said purpose in those cases wherein the state architect's office was not in position to furnish the service.

It has frequently been held that architectural service is a proper item to be charged against the appropriation for a given building fund. In fact the state architect's office reimburses its rotary fund from appropriations made for the construction of buildings to the various state departments. Under this method each department is billed for the architectural service furnished to it in connection with a given construction and the same is paid as any other item in the cost of construction.

You are therefore specifically advised that in my opinion the Adjutant General may employ an independent architect under the provisions of Section 2314 of the General Code, to perform the services as required in said section, in connection with the construction of an armory.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

1508.

TOWNSHIP ROAD—PORTION BOUNDED ON BOTH SIDES BY STATE PROPERTY—MAINTAINED PRIMARILY BY TOWNSHIP TRUSTEES.

*SYLLABUS:*

*A public road within a township, which has not been established as a county road or as a state highway, remains a township road. The fact that such highway leads to a state institution and the state owns land on either side thereof for half a mile in nowise affects its status.*

COLUMBUS, OHIO, February 10, 1930.

HON. R. S. CUNNINGHAM, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication which reads:

“The State of Ohio has purchased about 200 acres of additional land for the use of the Boys Industrial School in this county.

Through this land runs a township road. The State, by the new purchase, owns the land on each side of this road for about a half mile. The superintendent of the school has asked the township trustees to repair and maintain this portion of the county road and the township trustees feel that that is a duty devolving upon the school.

May we have your opinion as to who is responsible for the care, repair and maintenance of this section of the road?”

Section 7464 of the General Code defines the various classes of highways or roads within the state in the following language:

“The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include the roads and highways on the state highway system.

(b) County roads shall include all roads which have been or may