

opinion that it is empowered to employ an assistant county superintendent for one, two or as many days per week or month as in its judgment is proper.

Whether an assistant county superintendent is employed for part time or full time, one-half his salary not to exceed \$750.00 per year should be paid by the state.

Respectfully,

GILBERT BETTMAN,

Attorney General.

1506.

ELECTION LAW—MEMBERS OF BOARDS OF ELECTIONS—COMPENSATION DURING 1931 BASED ON POPULATION OF COUNTIES OBTAINED FROM 1930 FEDERAL CENSUS, IF SUCH CENSUS COMPLETED IN 1930.

SYLLABUS:

In the event the 1930 federal census is completed in the latter part of the year 1930, the compensation of members of 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.

COLUMBUS, OHIO, February 8, 1930.

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

GENTLEMEN:—Your letter of recent date is as follows:

“We respectfully request you to furnish this department with your written opinion upon the following matter:

In your Opinion No. 1256 of December 4th, 1929, it is held that members of boards of deputy supervisors and inspectors of elections who continue in office after January 1st, 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; and under your Opinion No. 1137 of November 1, 1929, it is held that the compensation of members of the board of elections of each of the several counties of the state for the year 1930, will be governed by the Federal census of 1920. Also that if the 1930 census is completed during the year 1930 no change can be made in the compensation of such members for that year.

Question: In the event that the 1930 census is completed in the latter part of the year 1930, will the compensation of such board members be increased or decreased in accordance with such census for the years following 1930 and during the term for which such members are appointed?”

Your question involves a consideration of Section 20, Article II of the Ohio Constitution, which provides:

“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 the existing term, unless the office be abolished.”

It may be stated at the outset that there is no doubt but that members of boards of elections are officers within the meaning of the section above quoted.

In the case of *State, ex rel. vs. Craig, et al.*, 8 O. N. P. 148, it was held that members of boards of deputy state supervisors of elections were not officers within the legal definition of that term. The Appellate Court, however, in deciding this case on appeal, 21 O. C. 175, apparently conceded the fact that deputy state supervisors of elections were officers. While the opinion of the court does not comment on the holding of the lower court to the effect that deputy state supervisors are not officers, they are referred to throughout as officers. The headnotes are as follows:

"(1) An injunction will not be granted to restrain the county auditor from issuing his warrant for the payment of the salaries or compensation of certain public officers, on the ground that such officers hold their office under an unconstitutional statute.

(2) Questions involving the title to office can only be determined by proceedings in quo warranto."

The next and more difficult question for determination is whether or not the compensation provided in Section 4785-18, General Code, for election board members is salary as contemplated in the section of the Constitution here under consideration. If it is, the present board members whose terms of office extend beyond the year 1930 must continue to be compensated on the basis of the 1920 census for the remainder of their term, notwithstanding the fact that the 1930 census may be completed the latter part of the year 1930. Section 4785-18, General Code, 113 O. L. 315, provides:

"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; 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."

An early case, which has been frequently cited, defines "salary" as used in Section 20, Article II, *supra*. I refer to the case of *Thompson, Relator vs. Phillips*, 12 O. S. 617, wherein the Supreme Court, after quoting the section of the Constitution, held:

"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 service rendered."

See also *Benedict vs. U. S.*, 176 U. S. 357, 360.

The question here becomes whether or not the compensation provided in Section 4785-18, supra, is "a payment dependent on the time, and not on the amount of the service rendered." There is no doubt but that the compensation of board members is dependent on time, since it is an annual compensation, but is it a payment "not on the amount of the service rendered"?

Prior to the effective date of Section 4785-18, supra, the compensation of deputy state supervisors of elections was provided in Sections 4822 and 4942, General Code, and this compensation was held by this office not to be salary within the meaning of Section 20, Article II of the Constitution, in an opinion reported in Opinions of the Attorney General for 1918, Vol. II, p. 1565, the syllabus of which is as follows:

"The provisions of Section 20 of Article II of the Constitution do not apply to members of the board of deputy state supervisors of elections, and they can draw the increased compensation as provided for in Section 4943, G. C., (107 O. L. 684), even though they were holding office at the time said amendment became effective, for the reason that they do not draw a salary as therein contemplated, but merely compensation."

Section 4822, General Code, provided a minimum and maximum annual compensation to be paid to deputy state supervisors, the amount dependent upon the number of precincts in a county. Section 4942, General Code, provided additional compensation to be paid to each deputy state supervisor in counties containing registration cities dependent upon the number of election precincts in such cities. In commenting upon whether or not such compensation was salary in the constitutional sense, the then Attorney General, in the above mentioned opinion at p. 1567, said:

"It must be further noted 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 in 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 the members of the board."

Section 4785-18, supra, provides a maximum and minimum annual compensation based not upon the number of precincts in a county, but upon the population. If the reasoning in the above opinion that the greater the number of precincts in a county the greater would be the services rendered by members of the board, is sound and I think it is, certainly the greater the population in a county the greater would be the services rendered by members of a board of elections in such county. It would, therefore, seem to follow that compensation based upon the number of precincts being compensation upon the amount of services rendered, similarly compensation based upon the population would be compensation based upon the amount of services rendered.

The view that the Legislature has sought to provide in Section 4785-18 com-

pensation rather than salary, as contemplated in Section 20 of Article II of the Constitution, is strengthened by the language of the section wherein no reference is made to "salary". While perhaps not controlling, the language used must certainly be given consideration. In an opinion of my predecessor appearing in the Opinions of the Attorney General for the year 1927, Vol. II, p. 905, 907, in considering the provisions of Section 3512, General Code, which refers to the compensation of a justice of the peace, the then Attorney General said:

"It will be noted that Section 3512, *supra*, provides that council may regulate the *compensation* of a justice of the peace while the constitutional provision referred to provides that the *salary* of an officer during his existing term shall not be changed."

There are other sections of the General Code providing for the pay of certain officers upon a basis of population. For instance, Section 2251, General Code, provides that judges of the common pleas courts shall receive an annual salary of three thousand dollars each, and Section 2252, General Code, provided, before amendment by the 87th General Assembly, additional compensation depending upon the population of the county in which each judge served "as ascertained by the federal census next preceding his assuming the duties of such office." Section 2252, General Code, as amended by the 87th General Assembly, provides additional compensation for judges of the Common Pleas Courts dependent upon "the population of the county in which he resided when elected, as ascertained by the last federal census of the United States."

The salary of prosecuting attorneys is provided by Section 3003, General Code, as follows:

"Each prosecuting attorney shall receive an annual salary of sixty dollars for each full one thousand of the first fifteen thousand of the population of the county as shown by the federal census next preceding his election. * * * "

In both of these instances, the Legislature has not only seen fit to refer to the payment to judges of Courts of Common Pleas and prosecuting attorneys as "salary", but has provided a rule whereby this annual salary shall be fixed by a consideration of a certain specified federal census, *viz.*, the one next preceding the assumption of the duties of office, on the one hand, and the one next preceding the election, on the other hand. The compensation of judges of the Courts of Common Pleas has been held to be salary within the meaning of Section 20, Article II of the Constitution, *supra*. *Zangerle vs. State, ex rel.*, 105 O. S. 650.

I find no reference in Section 4785-18, *supra*, to a specific federal census that shall be taken into consideration in determining the compensation of members of boards of elections. It is therein provided that this annual compensation shall be determined upon the basis of the population according to the next preceding federal census.

In the case of *Gobrecht vs. Cincinnati*, 51 O. S. 68, it was held that where the compensation of a public officer is fixed by a provision that "each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance", such compensation is not salary within the meaning of Section 20 of Article II of the Constitution. The court said, after referring to the case of *Thompson vs. Phillips*, *supra*, at pp. 72, 73:

"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.