

September 5, 2001

OPINION NO. 2001-038

The Honorable William E. Peelle  
Clinton County Prosecuting Attorney  
103 East Main Street  
Wilmington, Ohio 45177

Dear Prosecutor Peelle:

You have asked whether Ohio Const. art. II, § 20 applies to members of a county veterans service commission and, if so, whether members who are serving in office at the time the board of county commissioners enacts an increase in compensation may receive such increase if they all resign and are reappointed, almost immediately, to new terms of office.

You have explained in your opinion request that, in January 2001, the board of county commissioners adopted a resolution increasing the compensation of members of the county veterans service commission. The resolution provided that the higher rates were to become effective immediately, but could be implemented only upon the appointment of a new member to the commission or the reappointment of a current member to a new term of office. Subsequently, each member of the commission submitted his resignation, and on that same day, the judge of the court of common pleas reappointed the same individuals to new terms of office. The veterans service commission has now asked the board of county commissioners to increase its appropriation, in part, to enable the commission to pay its members the higher level of compensation set by the January resolution, and the county commissioners have asked about the applicability of Ohio Const. art. II, § 20 in this instance.

We begin with an examination of Ohio Const. art. II, § 20, which prohibits any change, whether an increase or decrease, in a public officer's salary during his term, 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.

We must first determine, therefore, whether a member of a county veterans service commission is an "officer" for purposes of Ohio Const. art. II, § 20.

Each county is required to have a veterans service commission. R.C. 5901.02. The commission is charged with providing financial assistance and other services to veterans and

their families. *See* R.C. 5901.03; R.C. 5901.08; R.C. 5901.15. The commission is composed of five persons who are appointed to five-year terms by a judge of the county common pleas court. R.C. 5901.02. A common pleas court judge is also charged with filling vacancies occurring on the commission “for the unexpired terms.” R.C. 5901.03. The board of county commissioners is given the duty to “fix a fair compensation” for the members. R.C. 5901.04.

We recently had occasion in 2001 Op. Att’y Gen. No. 2001-004 to determine whether a member of a county veterans service commission is an “officer” for purposes of Ohio Const. art. II, § 38.<sup>1</sup> Analyzing the attributes of a “public officer,” as developed by the courts and other authorities,<sup>2</sup> the opinion found that “members of a county veterans service commission are appointed pursuant to law and have a designation given to them by law, R.C. 5901.02, exercise functions concerning the public assigned to them by law, *see, e.g.*, R.C. 5901.03, and serve a term of office, R.C. 5901.02,” and concluded accordingly that members of a veterans service commission are officers for purposes of Ohio Const. art. II, § 38. *Id.* at 2-30. *See also State ex rel. Huron County Prosecutor v. Westerhold*, 72 Ohio St. 3d 392, 650 N.E.2d 463 (1995) (individual appointed to veterans service commission was subject to a writ of quo warranto under R.C. 2733.01(A), which provides that a quo warranto action may be brought “[a]gainst a person

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<sup>1</sup> Ohio Const. art. II, § 38, governs the removal of public officers from office and reads as follows:

Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of *all officers*, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution. (Emphasis added.)

<sup>2</sup> *State ex rel. Landis v. Board of Commissioners*, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917) is frequently cited for its explanation of the characteristics that constitute a position as a public office:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary.... The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office....

who usurps, intrudes into, or unlawfully holds or exercises a public office”); *State ex rel. O’Neill v. Fanning*, 134 Ohio St. 383, 17 N.E.2d 740 (1938) (a member of a soldiers’ relief commission (now called a veterans service commission) is entitled to continue in office until his successor is appointed pursuant to what is now R.C. 3.01, which applies to any “person holding an office of public trust”); 1962 Op. Att’y Gen. No. 3067, p. 441, 444 (overruled, in part, on other grounds by 1991 Op. Att’y Gen. No. 91-008) (concluding that a member of a soldiers’ relief commission “is a public officer within the general rule”).

These same common law criteria are used to determine whether a particular position is a public office for purposes of Ohio Const. art. II, § 20,<sup>3</sup> and we see no reason to deviate from that analysis in this instance. Accordingly, we conclude that members of a veterans service commission are “officers” for purposes of section 20 as well as section 38 of Article II, and may not, therefore, receive an increase in compensation during their term of office.

We turn now to your question whether members of a veterans service commission may receive an increase in compensation that is adopted during their term of office if they resign and are reappointed, almost immediately, to the commission. A nearly identical question was addressed in *City of Parma Heights v. Schroeder*, 93 Ohio L. Abs. 247, 196 N.E.2d 813 (C.P. Cuyahoga County 1963).<sup>4</sup> In that case, two city council members, who had been elected to a four-year term ending December 31, 1963, were serving in office at the time council passed an ordinance increasing the salary of council members, effective January 1, 1962. The two members resigned their office on January 2, 1962, and the vacancies created by their resignations were immediately filled by the appointment of the same two council members, who took the oath of office on that same day. In finding that the two council members were not entitled to receive the higher salary, the court stated:

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<sup>3</sup> See 1986 Op. Att’y Gen. No. 86-106 at 2-580 (“Ohio Const. art. II, § 20, has been construed as adopting the ordinary definition of ‘officer’” as set forth in *State ex rel. Landis v. Board of Commissioners*). See also 1997 Op. Att’y Gen. No. 97-005; 1985 Op. Att’y Gen. No. 85-036; 1980 Op. Att’y Gen. No. 80-050; 1979 Op. Att’y Gen. No. 79-102; 1974 Op. Att’y Gen. No. 74-021; 1973 Op. Att’y Gen. No. 73-131.

<sup>4</sup> At issue in *City of Parma Heights v. Schroeder*, 93 Ohio L. Abs. 247, 196 N.E.2d 813 (C.P. Cuyahoga County 1963) was a charter provision which provided that salaries of elected officials were to be fixed 120 days prior to a municipal election, and could “not thereafter be changed in respect to any term or terms or any part thereof.” 93 Ohio L. Abs. at 249, 196 N.E.2d at 814. The court interpreted the word “changed” as meaning salaries could not be raised or lowered “in keeping with long-established constitutional principles that salaries of public officers elected for set terms may not be increased or diminished during the term for which they were elected or appointed.” *Id.*

Part of the terms of the two councilmen had two years to run. If they had resigned and retired the law would say that their terms of office had come to an end. But such was not the case, for they immediately stepped back into the shoes they had been occupying before. [The council members] were elected to serve until the end of 1963. That was the length of their term and, as legislators in a body that had raised salaries during their term, they cannot change their status by two words, "I resign," and thereby resume their former places in council at the increased salary. Clearly one cannot do indirectly what he cannot lawfully do directly.

93 Ohio L. Abs. at 251, 196 N.E.2d at 816.

1980 Op. Att'y Gen. No. 80-048 addressed a similar issue. Two cities and a general health district had contracted in 1962 to form a combined health district which was governed by a board of seven members serving seven-year terms. A new contract was executed in March 1980, changing the terms from seven years to five years. The board members serving under the prior agreement were reappointed under the new contract, but for terms that were one year less than the number of years remaining in their original terms under the prior agreement. In 1979, the General Assembly had increased the compensation of health board members, and the board members of the combined general health district asked whether their new contract entitled them to that increase in compensation. The opinion concluded that the board members were not beginning new terms, but were continuing to serve out their old terms, although slightly shortened, and that payment of any increase in compensation for the members during the remainder of their original terms under the first contract would not be permitted pursuant to Ohio Const. art. II, § 20. Citing *City of Parma Heights v. Schroeder*, the opinion advises that, "one must confront the realities of the situation and, as in many other areas of the law, substance must triumph over form." *Id.* at 2-200 to 2-201.

A similar matter was also addressed in 1979 Op. Att'y Gen. No. 79-114, where an ordinance increasing the compensation for certain city offices was passed on December 18, 1979, but did not become effective until mid-January of 1980. The question arose whether a municipal officer who was serving at the time the ordinance was adopted, and who had been successfully re-elected to another term, which began on January 1, 1980, could delay the commencement of his second term until after the effective date of the pay increase so as to receive the higher salary. (R.C. 731.07 prohibits an officer of a noncharter city from

receiving an increase in salary during the term for which he was elected or appointed.) The opinion noted that the date on which the officer's term of office began was set by statute, and, again citing *City of Parma Heights v. Schroeder*, concluded that the municipal officer could not change the time of commencement or duration of his term and thus receive an increase in compensation that became effective after that time. *Id.* at 2-385 to 2-386.

In this instance, the commission members resigned and the judge of the common pleas court re-appointed them for the express purpose of securing for the members the higher salary. Pursuant to the authority cited above, we conclude that the commissioners are, in fact, continuing to serve out their original terms of office, and may not, therefore, receive the higher compensation during the time remaining in the terms they were serving when the increase was adopted. We understand that the judge agreed to make the re-appointments upon the resignation of the commission members because there has been no increase in compensation for the position of commission member for almost fifteen years, and the judge believed that extraordinary measures were warranted. We are not unsympathetic to the county's desire to set the salary of the commission members at an appropriate level. Now that the decision has been made to increase the compensation of commission members, however, implementation of that decision must, as a constitutional matter, await the commencement of what are, in substance as well as form, new terms of office.

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

1. Members of a county veterans service commission are "officers" for purposes of Ohio Const. art. II, § 20. Therefore, a member of a veterans service commission, who is holding office at the time the board of county commissioners increases the compensation for that position, is prohibited from receiving such increase for the duration of his term.
2. The members of a county veterans service commission, who are serving at the time the compensation for such position is increased by the board of county commissioners, may not receive such increase by resigning and being re-appointed to the commission by a judge of the common pleas court. They may receive such increase upon their reappointment to the commission only after the expiration of the term they were serving when the increase was adopted.

Respectfully,

BETTY D. MONTGOMERY  
Attorney General

September 5, 2001

The Honorable William E. Peelle  
Clinton County Prosecuting Attorney  
103 East Main Street  
Wilmington, Ohio 45177

SYLLABUS:

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2. The members of a county veterans service commission, who are serving at the time the compensation for such position is increased by the board of county commissioners, may not receive such increase by resigning and being re-appointed to the commission by a judge of the common pleas court. They may receive such increase upon their reappointment to the commission only after the expiration of the term they were serving when the increase was adopted.