

OPINIGN NO. 2000-043**Syllabus:**

1. If a board of township trustees passes a resolution increasing the annual salary for township trustees pursuant to R.C. 505.24, the trustees who are holding office at the time the increase is approved are prohibited by Ohio Const. art. II, § 20 from receiving the higher salary during their term of office, even though the increase does not result from action by the General Assembly, and even though the increase does not exceed the maximum salary permitted under R.C. 505.24.
2. A board of township trustees may pass a resolution that fixes the annual salary of township trustees as the maximum amount permitted under R.C. 505.24, without setting forth a specific dollar figure.
3. If a board of township trustees passes a resolution that fixes the annual salary of township trustees as the maximum amount permitted under R.C. 505.24, without setting forth a specific dollar figure, Ohio Const. art. II, § 20 prohibits a trustee from receiving an in-term increase in salary that results from a change by the General Assembly to the compensation scheme or compensation rates of R.C. 505.24 during the trustee's term. Ohio Const. art II. § 20 does not, however, prohibit a township trustee who is compensated pursuant to such a resolution from receiving an in-term increase in salary resulting from a statutory scheme, effective prior to the commencement of the trustee's term,

that provides periodic automatic increases in the rates of compensation for township trustees or from an increase in the township budget.

To: Jim Slagle, Marion County Prosecuting Attorney, Marion, Ohio
By: Betty D. Montgomery, Attorney General, December 29, 2000

You have asked the following questions concerning the compensation of township trustees:

1. Does the Ohio Constitution prohibit an individual township trustee from receiving an increase in compensation during his current term of office, where the board of township trustees passes a resolution increasing the annual salary for trustees to an amount not exceeding the maximum permitted by R.C. 505.24?
2. May a board of township trustees pass a resolution establishing the annual salary for trustees as the maximum amount permitted under R.C. 505.24, without setting forth any dollar figure?
3. Under R.C. 505.24 the maximum amount of compensation permitted for trustees is based on the size of the township budget. If the board of township trustees passes a resolution fixing the annual salary of trustees as the maximum amount permitted under R.C. 505.24, without setting forth a dollar figure, would a trustee be allowed to receive an increase in compensation during his current term of office if the township budget increases?

Your first question is whether the Ohio Constitution prohibits a township trustee from receiving an increase in compensation during his current term of office where the board of township trustees passes a resolution increasing the annual salary for trustees to an amount not exceeding the maximum permitted by R.C. 505.24. We will first examine R.C. 505.24, which addresses the compensation of township trustees, and then Ohio Const. art. II, § 20, which governs changes therein.

Division (A) of R.C. 505.24 provides for township trustees to be paid "for each day of service in the business of the township." The rate of compensation is based on the size of the township's budget, and trustees may be paid for not more than two hundred days. *Id.* For example, trustees in townships with a budget of fifty thousand dollars or less are entitled to be paid twenty dollars per day for not more than two hundred days, R.C. 505.24(A)(1), while trustees in townships with a budget of more than six million dollars are entitled to be paid fifty-two dollars per day for not more than two hundred days, R.C. 505.24(A)(9).¹ See generally 1999 Op. Att'y Gen. No. 99-015 (determination of a township's "budget" for purposes of R.C. 505.24); 1992 Op. Att'y Gen. No. 92-003 (same); 1979 Op. Att'y Gen. No. 79-006 (same).

¹R.C. 505.24 was amended by 1995-1996 Ohio Laws, Part III, 4589, 4621 (Am. Sub. H.B. 408, eff. May 8, 1996), and most recently by Sub. H.B. 712, 123rd Gen. A. (2000) (eff. Dec. 8, 2000), to provide an automatic increase in the per diem amounts in each calendar year, beginning in 1999. See R.C. 505.24(B).

A board of township trustees may, however, provide by unanimous vote for the compensation of trustees to be paid in the form of an annual salary rather than on a per diem basis. R.C. 505.24. The amount of the annual salary may not exceed "the maximum amount that could be received annually by a trustee if the trustee were paid on a per diem basis." *Id.*

Ohio Const. art. II, § 20 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.

Ohio Const. art. II, § 20 is applicable to township officers, including township trustees. *See State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975); 1977 Op. Att'y Gen. No. 77-083 at 2-282 (township trustees are officers covered by Ohio Const. art. II, § 20, which "obviously applies with equal force to annual salaries and per diem compensation").

It has been suggested that Ohio Const. art. II, § 20 does not prohibit a township trustee, who is paid an annual salary that is less than the maximum amount to which he would be entitled if paid on a per diem basis, from receiving an increase in salary approved during his term by the board of township trustees under R.C. 505.24, so long as (1) such increase is not the result of action by the General Assembly changing the compensation scheme or compensation rates of R.C. 505.24 during the trustee's term, and (2) the greater amount of salary does not exceed the maximum amount set by the General Assembly in R.C. 505.24 prior to the commencement of the trustee's term.

1980 Op. Att'y Gen. No. 80-050 considered the identical issues you have raised in the context of compensation for members of boards of education. At the time the opinion was issued, R.C. 3313.12 authorized a board of education to set the compensation of its members on a per meeting basis, with maximums set for both the dollar amount that could be paid per meeting and the number of meetings for which members could receive compensation.

The question was raised whether Ohio Const. art. II, § 20 prohibited the board members from receiving an increase in their per meeting rate (that did not exceed the maximum), since it was the board of education, rather than the General Assembly, which initiated the increase. The opinion notes that the General Assembly, in delegating its authority to set compensation to the board of education, "may not delegate more power than it possesses," stating, "[t]he board of education is bound by the same constitutional limitations as the state legislature." *Id.* at 2-206. The opinion continues:

When it becomes apparent that the board of education is merely acting in the stead of the General Assembly, the analysis becomes much more certain. The legislature may not constitutionally grant an increase in term to the members of the board. Therefore, the board is also barred from taking such action. This does not mean that the board may not vote in favor of a resolution increasing the salary of its members. This action may certainly be taken, so long as no person currently in office receives the benefit of the increase during such person's existing term.

Id.

This conclusion, that Ohio Const. art. II, § 20 applies to compensation increases approved by subordinate bodies to whom the General Assembly has delegated the authority to fix compensation, is well supported by case law. In *State ex rel. Holmes v. Thatcher*, 116 Ohio St. 113, 155 N.E. 691 (1927), the court found that Ohio Const. art. II, § 20 applied to salaries of municipal court judges which, at that time, were set by the board of county commissioners and city council within ranges established by the General Assembly, stating that no case decided by the court “has ever approved any statute, or any other legislative authority or quasi legislative authority, to increase the salary of any officer during an existing term of office” (emphasis added). *Id.*, 116 Ohio St. at 115, 155 N.E. at 691. And, more recently, the court held in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976), that the county recorder and prosecuting attorney, who were in office at the time the board of county commissioners authorized a health insurance plan and approved the payment of premiums, were precluded by Ohio Const. art. II, § 20 from having the county pay the premiums on their behalf during their term of office. This was so even though R.C. 305.171, the statute authorizing the board of county commissioners to provide health insurance, was enacted prior to the commencement of the officers’ terms of office.

Furthermore, an examination of the rationale for the prohibition against in-term increases in compensation supports the conclusion that Ohio Const. art. II, § 20 prohibits a trustee from receiving, while in term, any increase passed by the board of township trustees as well as any increase enacted by the General Assembly. In interpreting the constitutional provision in effect at the time prohibiting judges from receiving an in-term increase in compensation, the court in *State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 39 N.E.2d 840 (1942) explained:

The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed by the Legislature during the term; *that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary*; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. (Emphasis added.)

Id., 139 Ohio St. at 278, 39 N.E.2d at 843. See also 1980 Op. Att’y Gen. No. 80-002 at 2-8 (“[t]he principal mischief at which” the constitutional prohibitions against in-term increases in compensation “[are] aimed is the potential for an officeholder to abuse his official powers by bringing improper influence to bear on those who determine his compensation”). It is self-evident that the potential for abuse of official power and personal influence is much greater when an officer participates in the fixing of his own salary and that of his fellow board members than when the General Assembly exercises that authority.

Thus, the fact that the annual salary of township trustees is fixed by the board of township trustees rather than by the General Assembly does not exclude a trustee from application of Ohio Const. art. II, § 20 and permit him to receive, during his term of office, an increase in annual salary approved by the board of township trustees after the commencement of his term.

1980 Op. Att’y Gen. No. 80-050 also rejects the argument that an increase within a statutory maximum does not constitute an impermissible in-term increase:

Because the legislature had set a limit of \$40 per meeting in R.C. 3313.12, it can be argued that the members were entitled to that amount when they took office and that their failure to grant themselves the total amount should not bar them from later choosing to accept the maximum. This argument fails, however, to distinguish between compensation as a matter of right and compensation conditioned on a prior resolution.... [T]he board of education members, at the time they took office, were entitled only to what the board had previously set as their rate of compensation. They did not possess any *right* to the maximum of \$40. Instead, they possessed the authority to legislate regarding compensation in the same manner that the General Assembly legislates. The right of any board of education member to the \$40 maximum is conditioned on approval of that amount by the board prior to such member's term in office. In the situation you present, the previous board had set the compensation of the individual members at \$10 per meeting and, therefore, no right to compensation in excess of that amount came into existence prior to the beginning of existing terms of office. (Emphasis in original.)

Id. at 2-206. *See also* 1993 Op. Att'y Gen. No. 93-045 (a board of county commissioners is not required under R.C. 305.171 to provide insurance coverage to county officers, and if it does, it has the option of paying all or only a portion of the premium; if, however, the board changes the portion of the premium paid by the county, such change may not, pursuant to Ohio Const. art. II, § 20, be applied to a county officer during the term of office he was serving at the time the change became effective); 1984 Op. Att'y Gen. No. 84-069 (county elected officers who are holding office when the board of county commissioners increases the amount paid by the county on their behalf for health insurance premiums may not, pursuant to Ohio Const. art. II, § 20, receive the increase during their term of office).

In like manner, a board of township trustees is not required to pass a resolution setting the trustees' annual salary at the maximum amount they would be entitled to receive if paid on a per diem basis, and trustees are not entitled to the maximum salary absent a properly enacted resolution. *Cf. State ex rel. Noble v. Ellas*, No. CA-3507, 1990 Ohio App. LEXIS 2868 (Licking County July 9, 1990) (township trustees are entitled to per diem compensation as provided by R.C. 505.24, subject to the maximum number of days worked, and the township has no authority to change the per diem rate of pay or maximum number of days for which pay may be received). If, in exercising its statutory authority to set the annual salary of trustees, the board wishes to increase the salary which has been set below the maximum, it has the statutory authority to do so, so long as that amount does not exceed the maximum to which the trustees would be entitled if paid on a per diem basis. However, such increase may not, pursuant to Ohio Const. art. II, § 20, be paid to trustees during the term they were serving when the board enacted the increase.

In answer to your first question, therefore, if a board of township trustees passes a resolution increasing the annual salary for trustees pursuant to R.C. 505.24, the trustees who are holding office at the time the increase is approved are prohibited by Ohio Const. art. II, § 20 from receiving the higher salary during their term of office, even though the General Assembly has not acted to statutorily increase the compensation of trustees, and even though the increase does not exceed the maximum salary permitted under R.C. 505.24.

We will consider your next two questions together. You wish to know whether a board of township trustees may pass a resolution that establishes the annual salary of trustees as the maximum amount permitted under R.C. 505.24, without setting forth any dollar figure, and if so, how Ohio Const. art. II, § 20 is to be applied in that situation. As

explained above, R.C. 505.24 provides that trustees who are paid an annual salary may not be paid more than the maximum amount they could receive if paid on a per diem basis. R.C. 505.24 bases the per diem rate of compensation on the size of a township's budget and sets a maximum of two hundred days for which compensation may be received. Thus, the maximum amount a trustee who is paid an annual salary would be permitted to receive is equal to the applicable per diem rate multiplied by two hundred.

As noted in *State ex rel. Fritz v. Gongwer*, 114 Ohio St. 642, 650, 151 N.E. 752, 754 (1926), legislation by reference "is a recognized mode of legislation" in Ohio, explaining:

The effectiveness of legislation by reference has been so generally recognized in Ohio that no very specific declaration appears in the reported cases. As far back as the case of *Heirs of Ludlow v. Johnston*, reported in 3 Ohio, 553, 17 Am. Dec., 609, it was declared, in referring to legislation by reference:

"For this purpose the law referred to is, in effect, incorporated with and becomes a part of the one in which the reference is made, and so long as that statute continues, will remain a part of it."

Id., 114 Ohio St. at 649, 151 N.E. at 754. Thus, a board of township trustees may utilize "legislation by reference" and adopt a resolution that establishes the annual salary of trustees as the maximum amount permitted under R.C. 505.24, without setting forth a specific dollar figure.

The board of township trustees may not, however, avoid application of Ohio Const. art. II, § 20 by establishing the annual salary of trustees as the maximum amount permitted under R.C. 505.24 rather than fixing a specific dollar amount. In *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983), the court interpreted R.C. 1901.31(C), an example of legislation by reference, which fixed the compensation of the municipal clerk of court as a percentage of the salary of a judge of the municipal court, but no more than the compensation of the county clerk of courts. The court held that, where the county clerks' compensation was statutorily increased, municipal court clerks could receive, during their term of office, a corresponding increase. The court reasoned that, while the General Assembly's amendment of the statute increasing the compensation of county clerks had "an indirect effect" on the municipal clerk's salary, the change in the statute for county clerks "was in no way a change in the formula used to fix the compensation of a municipal clerk." *Id.*, 6 Ohio St. 3d at 134, 451 N.E.2d at 797. As the court noted, however, Ohio Const. art. II, § 20 would forbid "the granting of in-term salary increases to officers when such changes are the result of direct legislative action on the section(s) of the Revised Code which are the basis of the officers' salaries." *Id.*, 6 Ohio St. 3d at 135, 451 N.E.2d at 798. *Accord State ex rel. Mack v. Guckenberger* (a common pleas court judge, whose compensation was set by reference to an external factor, was not prohibited from receiving an in-term increase in compensation where the increase was due solely to a change in the external factor and there was no direct change in the statutory sections setting forth the formula for calculating the compensation).

A legislative amendment of R.C. 505.24 increasing the maximum amount of compensation that township trustees could receive if paid on a per diem basis, which would then be referenced and used by the board of township trustees to increase the annual salary of trustees, *would* involve direct legislative action on the section of the Revised Code which is the basis of the trustees' salary. Thus, if R.C. 505.24 were amended to increase the maximum amount of compensation trustees could receive if paid on a per diem basis, trustees receiving

an annual salary pursuant to a resolution fixing the trustees' salary as the maximum amount allowable under R.C. 505.24 may not receive in-term the corresponding increase in salary. *See generally City of Parma Heights v. Schroeder*, 93 Ohio L. Abs. 247, 196 N.E.2d 813 (C.P. Cuyahoga County 1963) (a public official cannot do indirectly what he cannot do directly). A trustee who is compensated pursuant to such a resolution would, however, be entitled to receive in-term increases in salary based on automatic periodic increases in the per diem rate, such as the annual increases set forth in division (B) of R.C. 505.24, *see note 1, supra*, so long as the statutory scheme granting the automatic increases was in effect before the commencement of the trustee's term. 1986 Op. Att'y Gen. No. 86-106.

Furthermore, if the township budget increases during the term of a township trustee, such that the maximum amount a trustee could receive if paid on a per diem basis increases, then trustees whose annual salary is set by reference to the maximum amount allowable under R.C. 505.24 are not prohibited by Ohio Const. art. II, § 20 from receiving the increase in salary since such increase would result from a change in the external factor used to fix compensation, rather than from an amendment of the legislative formula itself. 1977 Op. Att'y Gen. No. 77-083, in concluding that township trustees paid on a per diem basis could receive an in-term increase resulting from an increase in the township budget, noted that township trustees, as the taxing authority, do have the ability to influence the township budget but, "the factors affecting township budgets are sufficiently independent of the township trustees," to preclude application of Ohio Const. art. II, § 20. *Id.* at 2-284. *Accord* 1979 Op. Att'y Gen. No. 79-006. As emphasized in 1977 Op. Att'y Gen. No. 77-083, as well as by the court in *Schultz v. Garrett* and *State ex rel. Mack v. Guckenberger*, however, any increase in compensation resulting from a change in one of the external factors used to calculate the compensation of an office is payable, in-term, to a current officeholder only where the formula or basis for calculating the compensation is established, whether by statute or resolution, prior to the beginning of the officeholder's term.

Similarly, if a resolution ties the trustees' annual salary to the maximum amount they are entitled to receive if paid on a per diem basis, and if the township budget increases such that a trustee is entitled to an increase if paid on a per diem basis, then the trustee may receive a corresponding increase in annual salary during his term of office, so long as the resolution was effective prior to the beginning of the trustee's term. We emphasize, however, that the trustee is still prohibited from receiving, in-term, any increase resulting from action by the General Assembly that either changes the compensation of township trustees or the method by which the compensation is fixed.

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

1. If a board of township trustees passes a resolution increasing the annual salary for township trustees pursuant to R.C. 505.24, the trustees who are holding office at the time the increase is approved are prohibited by Ohio Const. art. II, § 20 from receiving the higher salary during their term of office, even though the increase does not result from action by the General Assembly, and even though the increase does not exceed the maximum salary permitted under R.C. 505.24.
2. A board of township trustees may pass a resolution that fixes the annual salary of township trustees as the maximum amount permitted under R.C. 505.24, without setting forth a specific dollar figure.
3. If a board of township trustees passes a resolution that fixes the annual salary of township trustees as the maximum amount permitted under

R.C. 505.24, without setting forth a specific dollar figure, Ohio Const. art. II, § 20 prohibits a trustee from receiving an in-term increase in salary that results from a change by the General Assembly to the compensation scheme or compensation rates of R.C. 505.24 during the trustee's term. Ohio Const. art II. § 20 does not, however, prohibit a township trustee who is compensated pursuant to such a resolution from receiving an in-term increase in salary resulting from a statutory scheme, effective prior to the commencement of the trustee's term, that provides periodic automatic increases in the rates of compensation for township trustees or from an increase in the township budget.