

2457.

APPROVAL, REFUNDING BONDS OF DEFIANCE CITY SCHOOL DISTRICT IN AMOUNT OF \$40,000.

COLUMBUS, OHIO, October 8, 1921.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2458.

SUPERINTENDENT OF PUBLIC INSTRUCTION—NOW DIRECTOR OF EDUCATION—SALARY DETERMINED.

The present incumbent of the office of superintendent of public instruction who was appointed for a term of four years, beginning April 6, 1920, is entitled to receive an annual salary of \$6,500 from July 1, 1921, to the end of his present term of office.

COLUMBUS, OHIO, October 10, 1921.

HON. HARRY L. DAVIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your letter of recent date inquiring whether or not Hon. Vernon M. Riegel, who was appointed superintendent of public instruction on April 6, 1920, for a term of four years, is entitled to receive the salary of \$6,500 provided for in section 2250 G. C., as amended by the recent administrative code, was duly received.

For several years prior to the second Monday in July, 1913, the effective date of section 4, article VI, Ohio constitution, hereinafter quoted, there was in existence the statutory office of state commissioner of common schools. This office, which was an elective one, was created as early at least as March 14, 1853. See 51 O. S. 446, section 47; section 354 R. S. of 1880; section 352 G. C. of 1910.

During all that time the salary of the state commissioner of common schools was fixed by statute. See 51 O. L. 448, section 57; section 1284 R. S. of 1880; section 2248 G. C. of 1910. The statute (section 2248 G. C.) fixing the salary, and in effect at the time section 4, article VI, Ohio Constitution, became effective, so far as pertinent, read as follows:

“The annual salaries of the elective executive officers of the state shall be as follows: * * * State commissioner of common schools, four thousand dollars.”

On September 3, 1912, the people of Ohio adopted section 4, article VI, Ohio Constitution, providing for the appointment by the governor of a superintendent of public instruction to replace the state commissioner of common schools, as follows:

“A superintendent of public instruction to replace the state commissioner of common schools, shall be included as one of the officers of the executive department to be appointed by the governor, for the term of four years, with the powers and duties now exercised by the

state commissioner of common schools until otherwise provided by law, and with such other powers as may be provided by law."

Following the adoption of this constitutional provision the general assembly amended sections 352 et seq. of the General Code, which theretofore dealt with the statutory and elective office of state commissioner of common schools, so as to make them applicable to the newly created constitutional and appointive office of superintendent of public instruction, but no provision was inserted in that group of statutes fixing the compensation or salary of the new officer, neither did those statutes prior to the amendment make any provision whatever for the compensation or salary of the state commissioner of common schools. The failure to make provision for the salary of the state commissioner of common schools is explained by the fact that his salary was fixed by another section, to wit, former section 2248 G. C. above quoted.

No attempt was made to amend section 2248 G. C. so as to strike therefrom the reference therein to the state commissioner of common schools, nor was any attempt made to amend section 2250 G. C., which was the statute fixing the salaries of appointive state officers, so as to include the superintendent of public instruction in the group of enumerated officers, until the year 1921, when, for the first time, and almost ten years after the adoption of section 4, article VI, Ohio Constitution, section 2248 G. C. was amended by eliminating all reference to the state commissioner of common schools, and section 2250 G. C. was amended so as to include the superintendent of public instruction among the group of appointive officers. These amendments to sections 2248 and 2250 G. C. are found in the administrative code, effective July 1, 1921. In other words, it was not until the amendment of section 2250 G. C., effective July 1, 1921, that the general assembly undertook to discharge the duty imposed upon it by section 20, article II, Ohio Constitution, which provides, among other things, that the general assembly in cases not provided for in the constitution "shall fix * * * the compensation of all officers," unless it can be held that its action in passing bills making general appropriations for the biennial expenses of the state government, wherein money was appropriated under the designation "Department of Public Instruction, Personal Service, A 1. Salaries, Superintendent \$4,000.00," (see, for example, 106 O. L. 699, 780; 107 O. L., 223, 298; 108 O. L. 772, 855) can be held to operate as a discharge of that duty.

In my opinion the compensation or salary of the superintendent of public instruction was not fixed by the general assembly in the constitutional sense, until the amendment of section 2250 of the General Code in 1921, as found in the administrative code. See 109 O. L., pp. 105, 128, 129. The amended section, so far as necessary to be noticed, provides that:

"The annual salaries of the appointive state officers and employes herein enumerated shall be as follows: * * * Department of education; superintendent of public instruction as director of education, six thousand five hundred dollars."

If it should be held that the general appropriation bills fixed the compensation or salary of the superintendent of public instruction within the meaning of section 20, article II, Ohio Constitution, it would then be impossible for the present incumbent, whose term of office began on April 6, 1920, to receive during his four year term more than the amount appropriated by the general appropriation act passed May 28, 1919, and covering only the fiscal years ending June 30, 1920, and June 30, 1921, by reason of the constitu-

tional inhibition against increasing salaries during terms of office. Surely no such result was thought of or intended by any one.

Judicial authority supports the proposition that compensation or salary is not fixed unless the amount thereof has been definitely decided or determined.

"To 'fix' a compensation is to prescribe a rule or rate by which it is to be determined." *Flagg vs. County*, 51 Ore., 172, 177, 178. In *Zimmerman vs. Canfield*, 42 O. S. 463, 467, 468, compensation was held to be *fixed*, within the meaning of a statute requiring the commissioners to fix compensation for lands appropriated, when the amount to be allowed was "determined upon." "To fix the value of the property" was held in *People vs. Nassau Co.*, 104 N. Y. Supp., 350, 356, to mean "final determination." Also, "to decide definitely; make sure; settle; determine." In *Gas Co. vs. Peru*, 89 Fed., 185, 189, it was said that "fix," in an ordinance authorizing council to "fix the rate" to be charged for gas, means "to make fast, firm, or immovable." In *Crickett vs. State*, 18 O. S., 9, 21, the duty imposed upon the general assembly to "fix * * * the compensation" of officers, was held discharged when that body "shall prescribe or 'fix' the *rule* by which compensation is to be determined." In *Huck vs. Gaylord*, 50 Tex., 578, 582, the court employed Worcester's definition, viz.: "Worcester defines the word, fix, 'To settle or remain permanently.'" The word "fix," is also defined in *Funk and Wagnall's New Standard Dictionary*, viz.: "To decide definitely; make sure; settle; determine." And in *Hedrick and Walden's Cases*, 16 Ct. of Claims, 88, it was held that "A salary is 'fixed' when it is at a stipulated rate for a defined period of time."

The general assembly, itself, it is believed, has over a long period of years placed a practical construction on section 20, article II, Ohio Constitution, to the effect that salary to be fixed, within the constitutional sense, requires that the amount thereof be fixed by legislation other than appropriation bills. Examples or evidence of this construction will be found in sections 2248 and 2250 G. C., *supra*, covering the elective, executive and appointive state officers; sections 2050-1 and 2050-2 G. C., fixing the annual salaries of members of the tax and public utilities commissions, and section 2251 G. C., fixing the annual salaries of the judges of the supreme court, courts of appeal, common pleas, and superior courts.

Having reached the conclusion that the general assembly of this state did not fix the compensation or salary of the superintendent of public instruction within the constitutional sense, until the recent amendment of section 2250 G. C., you are advised that Mr. Riegel is entitled to receive the salary of \$6,500 fixed and provided for by that amendment from July 1, 1921.

The conclusion reached renders it unnecessary to determine whether or not the administrative code has imposed additional duties upon the superintendent of public instruction not germane to those theretofore imposed upon him by law, or his right to receive additional salary or compensation on account of such duties in case any have been imposed.

Respectfully,
JOHN G. PRICE,
Attorney-General.