

**OPINION NO. 97-052****Syllabus:**

1. The Ohio Water Development Authority's payment of health care benefits pursuant to R.C. 6121.02, as amended by Am. Sub. H.B. 215, 122nd Gen. A. (1977) (eff., in pertinent part, June 30, 1997), on behalf of a member of the Ohio Water Development Authority for the period remaining in the term the member was serving on June 30, 1997, violates the prohibition against in-term changes in the salary of public officers established by Ohio Const. art. II, § 20.
2. The procurement of the health care benefits described in R.C. 6121.02 by a member of the Ohio Water Development Authority with the member's own financial resources does not violate Ohio Const. art. II, § 20.

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**To: John D. McClure, Chairman, Ohio Water Development Authority, Columbus, Ohio**  
**By: Betty D. Montgomery, Attorney General, October 31, 1997**

You have asked for an opinion concerning the amendment of R.C. 6121.02 in Am. Sub. H.B. 215, 122nd Gen. A. (1997) (eff., in pertinent part, June 30, 1997). In Am. Sub. H.B. 215, the General Assembly added to R.C. 6121.02 certain language concerning health care benefits for members of the Ohio Water Development Authority (OWDA). In light of this new language, you question whether article II, § 20 of the Ohio Constitution prohibits the OWDA from paying the cost of providing health care benefits for an OWDA member during the term the member was serving on the effective date of the amendment to R.C. 6121.02.

In order to understand your concern, let us begin by examining the pertinent portion of R.C. 6121.02, which states:

Each appointed member of the authority shall receive an annual salary of five thousand dollars, payable in monthly installments, and is entitled to health care benefits comparable to those generally available to state officers and employees under [R.C. 124.82]. If [Ohio Const. art. II, § 20] prohibits the Ohio water development authority from paying all or a part of the cost of health care benefits on behalf of a member of the authority for the remainder of an existing term, the member may receive these benefits by paying their total cost from the member's own financial resources, including paying by means of deductions from the member's salary. (New language indicated by underlining.)

As mentioned in your letter, the amendment to R.C. 6121.02 itself raises the question of whether the provision of health care benefits to OWDA members violates Ohio Const. art. II, § 20.

The constitutional provision referred to in R.C. 6121.02, Ohio Const. art. II, § 20, states: "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." (Emphasis added.) As summarized in 1992 Op. Att'y Gen. No. 92-031 at 2-120, "[t]his provision of the Constitution ... prohibits any change, whether an increase or decrease, in an officer's salary during his term."

Whether Ohio Const. art. II, § 20 prohibits the OWDA from paying for health care benefits for its members depends, in part, upon whether such members are officers within the meaning of art. II, § 20. The ordinary definition of "officer" set forth in *State ex rel. Landis v. Bd. of Comm'rs*, 95 Ohio St. 157, 115 N.E. 919 (1917), has been adopted for purposes of Ohio Const. art. II, § 20. *State ex rel. Milburn v. Pethel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950). The *Landis* court's definition of "officer" reads as follows:

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 and not an employment.

....  
... [I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.... If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public,

wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.

95 Ohio St. 157, 159-61, 115 N.E. 919, 919-20.

Applying the *Landis* test to the position of member of the Ohio Water Development Authority, we must consider R.C. 6121.02, which provides for the establishment of the Authority and the appointment of its members. Pursuant to R.C. 6121.02, the OWDA consists of eight members, five of whom are appointed by the Governor and three of whom are *ex officio* members.<sup>1</sup> R.C. 6121.02 further provides that each appointed member serves a term of eight years, beginning on the second day of July. Before entering upon the official duties of the OWDA, each member is required to take the oath prescribed by Ohio Const. art. XV, § 7,<sup>2</sup> and, prior to the issuance of any water development bonds under R.C. Chapter 6121, each member must give a surety bond to the state. R.C. 6121.02. The appointed members of the Authority are entitled to receive compensation as prescribed in R.C. 6121.02. *Id.* Thus, OWDA members have several characteristics typical of public officers.

Most indicative of the members' status as public officers, however, is the portion of R.C. 6121.02 which describes the carrying out of the Authority's purposes and the exercise of the Authority's powers under R.C. Chapter 6121 as "essential governmental functions and public purposes of the state." *See also* R.C. 6121.03 (declaring it to be "the public policy of the state through the operations of the Ohio water development authority under [R.C. Chapter 6121] to contribute to" certain stated purposes by various means, including the issuance of water development revenue bonds of the state, payable solely from revenues, to finance projects that carry out its purposes). The independence with which the members of the OWDA carry out the Authority's purposes and operations is readily apparent from the types of powers granted the Authority by R.C. 6121.04, *e.g.*, the ability to make loans and grants to governmental agencies for water development projects, the authority to issue water development revenue bonds, and the authority to contract and execute necessary instruments in the performance of its powers and duties under R.C. Chapter 6121. *See also* R.C. 6121.06(A) (stating in part, "[t]he Ohio water development authority may, from time to time, issue water development revenue bonds and notes of the state in such principal amount as, in the opinion of the authority, are necessary for the purpose of paying any part of the cost of one or more water development projects or parts thereof"). Thus, in addition to the other characteristics of public office conferred upon OWDA members by R.C. 6121.02, the nature of the duties imposed upon the members indicates that, in carrying out the business of the OWDA, the members exercise independent, continuing governmental functions and are, therefore, public officers subject to the prohibition of Ohio Const. art. II, § 20 against in-term changes in compensation.

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<sup>1</sup> Because the *ex officio* members of the OWDA are not entitled to receive compensation for their service as Authority members, this opinion will address the authority to provide health care benefits mid-term for the appointed members of the Authority.

<sup>2</sup> Ohio Const. art. XV, § 7 states: "Every person chosen or appointed to *any office* under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office." (Emphasis added.)

Having concluded that the members of the OWDA are officers who are subject to Ohio Const. art. II, § 20, we must determine whether the Authority's payment of the cost of health care benefits for Authority members constitutes a change in compensation within the meaning of the constitutional prohibition. For purposes of art. II, § 20, the terms "compensation" and "salary" are synonymous. *State ex rel. Artmayer v. Bd. of Trustees*, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975) (syllabus). Included within the meaning of "salary" and "compensation" are payments made to provide health insurance benefits. As explained by the court in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692, 694 (1976):

Fringe benefits, such as the payments [for insurance coverage] made here, are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check. It is obvious that an office holder is benefitted and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and only then transmitted to the insurance company. Such payments for fringe benefits may not constitute "salary," in the strictest sense of that word, but they are compensation.

The use of public funds to provide health care benefits in accordance with the recent amendment to R.C. 6121.02, thus, constitutes compensation within the meaning of Ohio Const. art. II, § 20. Because health care benefits were not previously provided as part of the salary or compensation of OWDA members, the provision of such benefits constitutes a change in compensation for purposes of art. II, § 20.<sup>3</sup>

The next matter that must be considered in answering your question is the relation between each appointed member's term of office and the effective date of the amendment to R.C. 6121.02 about which you ask. As held in *State ex rel. v. Raine*, 49 Ohio St. 580, 31 N.E. 741 (1892) (syllabus), "[a] statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office, contravenes section 20, of article II, of the Constitution of this state, in so far as it may affect the salary of an incumbent of the office *during the term he was serving when the statute was enacted.*" (Emphasis added.) The amendment to R.C. 6121.02 in Am. Sub. H.B. 215 became effective on June 30, 1997. Pursuant to R.C. 6121.02, the eight-year term of each appointed member of the OWDA begins on the second day of July. Thus, any appointed member who was serving a term of office on June 30, 1997, is prohibited from receiving paid health care benefits during the remainder of the term the member was serving on that date. See generally *State ex rel. Glander v. Ferguson*, 148 Ohio St. 581, 76 N.E.2d 373 (1947) (syllabus, paragraph one) (explaining that the phrase "during his existing term," as used

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<sup>3</sup> See 1992 Op. Att'y Gen. No. 92-068 (syllabus, paragraph two) ("Ohio Const. art. II, § 20 prohibits any change in the compensation of a township trustee during the trustee's existing term; accordingly, the purchase of health or hospitalization insurance for a township trustee must be authorized by resolution before the trustee's term begins"); 1990 Op. Att'y Gen. No. 90-108 (syllabus, paragraph two) ("[a] board of elections may not, after a board member's term has begun, authorize the procurement of insurance for that member under R.C. 3501.141(B) to commence during his term of office"); 1984 Op. Att'y Gen. No. 84-069 (syllabus) ("[p]ursuant to Ohio Const. art. II, § 20, a county elected officer who holds office when the board of county commissioners increases the amount paid by the county on behalf of county officers for the officers' health insurance premiums is not entitled to receive the increase for the duration of the term he was serving at the time the increase was implemented").

in art. II, § 20, refers "strictly to the term to which the officer is appointed or elected and not to the period constituting the statutory term of the office").

As a final matter, however, the recent amendment to R.C. 6121.02 appears to have contemplated this situation, and has also provided that, "[i]f [Ohio Const. art. II, § 20] prohibits the Ohio water development authority from paying all or a part of the cost of health care benefits on behalf of a member of the authority for the remainder of an existing term, the member may receive these benefits by paying their total cost from the member's own financial resources, including paying by means of deductions from the member's salary." Thus, even though Ohio Const. art. II, § 20 prohibits an appointed OWDA member from receiving paid health care benefits as part of the member's compensation during the term of office the member was serving on June 30, 1997, an OWDA member may, from his own financial resources, procure the health care benefits referred to in R.C. 6121.02. Under such a scheme, the benefits are not being paid for from public funds, but from the member's own financial resources. *See State ex rel. Parsons v. Ferguson, supra*; 1981 Op. Att'y Gen. No. 81-099 at 2-374 ("[i]nsurance benefits for public officers paid for out of public funds are ... compensation which comes within the purview of art. II, § 20" (emphasis added)). Thus, the portion of R.C. 6121.02 authorizing the appointed members of the OWDA, for the period remaining in the terms they were serving on June 30, 1997, to procure the health care benefits mentioned in R.C. 6121.02 from the members' own financial resources does not violate Ohio Const. art. II, § 20.

Based upon the foregoing, it is my opinion and you are hereby advised that:

1. The Ohio Water Development Authority's payment of health care benefits pursuant to R.C. 6121.02, as amended by Am. Sub. H.B. 215, 122nd Gen. A. (1977) (eff., in pertinent part, June 30, 1997), on behalf of a member of the Ohio Water Development Authority for the period remaining in the term the member was serving on June 30, 1997, violates the prohibition against in-term changes in the salary of public officers established by Ohio Const. art. II, § 20.
2. The procurement of the health care benefits described in R.C. 6121.02 by a member of the Ohio Water Development Authority with the member's own financial resources does not violate Ohio Const. art. II, § 20.