OPINION NO. 2013-016

Syllabus:

2013-016

1. Article II, § 20 of the Ohio Constitution does not prohibit a board of county commissioners from changing the amount of compensation that is paid to a county engineer for performing the duties of the county sanitary engineer. (1931 Op. Att'y Gen. No. 2864, vol. I, p. 90, overruled in part.)
2. A board of county commissioners is not authorized to structure an agreement with the county engineer under R.C. 315.14 such that the county engineer performs the duties of the county sanitary engineer as an independent contractor. (1956 Op. Att'y Gen. No. 6196, p. 26, overruled in part.)
3. A board of county commissioners is authorized to hire a registered professional engineer other than the county engineer to perform the duties of the county sanitary engineer. However, when the county sanitary engineer is a registered professional engineer other than the county engineer, R.C. 6117.01(C) requires that prior to the initial assignment of drainage facilities duties to the county sanitary engineer, a board of county commissioners first offers to enter into an agreement with the county engineer pursuant to R.C. 315.14 for assistance in the performance of those duties of the board pertaining to drainage facilities.
4. An agreement pursuant to R.C. 315.14 between a board of county commissioners and a county engineer is not required by the terms of R.C. 315.14 to be in writing. Depending upon the terms of the particular agreement, R.C. 1335.05, Ohio's Statute of Frauds, may require the agreement to be evidenced by a document signed by the party to be charged to be enforceable in a court of law.

To: Stephen J. Pronai, Madison County Prosecuting Attorney, London, Ohio

By: Michael DeWine, Ohio Attorney General, May 13, 2013

You have requested an opinion concerning the compensation that is paid to a county engineer for performing duties of the county sanitary engineer pursuant to an agreement under R.C. 315.14. The board of county commissioners has entered into an agreement with the county engineer, pursuant to R.C. 315.14, whereby the county engineer performs the duties of the county sanitary engineer. There is no written document memorializing this agreement. You explain that the board of county commissioners wants to renegotiate the agreement and reduce the amount of compensation that is paid to the county engineer for performing the county sanitary

engineer's duties. The county engineer began a new term of office in January 2013. In light of this background, you have asked the following questions:[1]

1. Does Article II, § 20 of the Ohio Constitution prohibit the board of county commissioners from reducing the amount of compensation that is paid to the county engineer for performing the duties of the county sanitary engineer?
2. May the board of county commissioners renegotiate the existing agreement to provide that the county engineer performs the duties of the county sanitary engineer as an independent contractor?
3. May the board of county commissioners instead terminate its existing agreement with the county engineer and hire another county sanitary engineer?
4. Does the fact that no written agreement exists between the board of county commissioners and the county engineer affect the analysis of the foregoing questions?

Discussion of R.C. 315.14

Your questions relate to compensation that is paid to a county engineer for performing duties of the county sanitary engineer. R.C. 315.14 authorizes a board of county commissioners to enter into an agreement with the county engineer whereby the board of county commissioners compensates the county engineer for performing duties of the county sanitary engineer. R.C. 315.14, which describes various duties of a county engineer, states in pertinent part:

> [The county engineer] shall make all surveys required by law, shall perform all necessary services to be performed by a registered surveyor or registered professional engineer in connection with the construction, repair, or opening of all county roads or ditches constructed under the authority of the board, and shall perform other duties as the board requires, *provided that the duties described in . . . [R.C. Chapters 343, 6103, and 6117, which set forth the duties of the county sanitary engineer,] shall be performed only pursuant to an agreement between the county engineer and the board [of county commissioners]*. An agreement of that type may provide for the county engineer's performance of duties described in one or more of those sections or chapters, and may provide for the county engineer's performance of all duties imposed upon a county sanitary engineer under [R.C. Chapters 6103 and 6117] or only the duties imposed upon a county sanitary engineer under [R.C. Chapter 6117] in relation to drainage. *The board shall determine the compensation for performance of the relevant duties described in . . . [R.C. Chapters 343, 6103, and 6117] and shall pay the county engineer*

[1] We have reordered and rephrased your questions for ease of discussion.

> *from funds available under the applicable chapter or chapters or from the general fund of the county.* (Emphasis added.)

Pursuant to this language, a board of county commissioners is authorized to enter into an agreement providing the county engineer compensation for performing duties of the county sanitary engineer. Absent such an agreement, a county engineer is not responsible for performing any duties of the county sanitary engineer. You have indicated that the board of county commissioners and the county engineer have entered into such an agreement.

Article II, § 20 of the Ohio Constitution

Your first question asks whether Article II, § 20 of the Ohio Constitution prohibits the board of county commissioners from reducing the amount of compensation that is paid to the county engineer for performing the duties of the county sanitary engineer.[2] Article II, § 20 of the Ohio Constitution declares that "[t]he general assembly, in cases not provided for in this constitution, shall fix the

[2] Your first three questions relate to the board of county commissioners' authority to amend its existing agreement with the county engineer in various ways. Basic contract principles may prevent the board of county commissioners from unilaterally amending or terminating its agreement with the county engineer. *See Nagle Heating & Air Conditioning Co. v. Heskett*, 66 Ohio App. 3d 547, 550, 585 N.E.2d 866 (Scioto County 1990) ("[a] contract cannot be unilaterally modified. In order to modify a contract, the parties to that contract must mutually consent to the modification"); 1988 Op. Att'y Gen. No. 88-076 (syllabus, paragraph 1) ("[u]nless a statute provides to the contrary, the contracts of a governmental entity are governed by the same principles that apply to contracts between individuals"); *see also LRL Props. v. Portage Metro. Hous. Auth.*, No. 98-P-0070, 1999 Ohio App. LEXIS 6130, at *27 (Portage County Dec. 17, 1999) ("R.C. 2744 grants immunity to political subdivisions and their employees against [tort] claims; however, R.C. 2744 does not immunize political subdivisions from claims for breach of contract"). Absent statutory or contractual terms providing for renegotiation, a party to a contract has no power to require another party to renegotiate the terms of the contract. 1988 Op. Att'y Gen. No. 88-076, at 2-372.

We are not aware of a statutory provision authorizing a board of county commissioners to compel renegotiation of an agreement that it has entered into with a county engineer under R.C. 315.14. Thus, the board of county commissioners' agreement with the county engineer may be modified if the terms of the agreement provide for modification or, alternately, if the parties agree to amend the agreement and provide sufficient consideration for the modification. *See generally* 1988 Op. Att'y Gen. No. 88-076, at 2-371 to 2-372 (discussing the authority of a governmental entity to renegotiate a contract). Absent these circumstances, modification of the agreement may constitute a breach of contract. Because "it is inappropriate to use a formal opinion of the Attorney General to make findings of fact or to attempt to determine rights between particular parties," we are unable to determine whether any of the proposed modifications will constitute a breach of the existing agreement

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.'' This constitutional provision prohibits any change, whether an increase or decrease, in a public officer's compensation during his existing term of office. 2003 Op. Att'y Gen. No. 2003-027, at 2-226. Article II, § 20's prohibition against in-term changes in compensation is premised on the concept that ''[a] person enters an office, to which a fixed salary is attached, with the understanding that he is to perform, at that same salary, not only those duties currently prescribed but all duties which may subsequently arise within the scope of that office.'' 1980 Op. Att'y Gen. No. 80-073, at 2-293; *see also Lewis v. State ex rel. Harrison*, 11 Ohio Cir. Dec. 647, 648 (Hamilton County 1901) (the reasoning behind constitutional prohibitions against in-term compensation changes ''sounds in contract, and is that one entering upon an office to which a salary or compensation has been affixed, undertakes not only to perform such duties as are prescribed to such office, but has in contemplation the performance of all duties which may arise which are naturally incident to such office or are germane to it, and that when the legislature specifies an additional duty germane in its nature and naturally incident to the office, it has added nothing but what the officer is deemed to have had in contemplation when he entered upon the office at a fixed salary'').

When a public officer is assigned additional duties that are neither incidental nor germane to his public office, Article II, § 20 does not apply. *Derhammer v. Medina Cnty. Bd. of Comm'rs*, 38 Ohio Op. 439, 443, 83 N.E.2d 400 (C.P. Medina County 1948) (''[e]ven where there are not two distinct offices involved and additional duties not germane or incident to an office are imposed upon the incumbent, the constitutional inhibition [Article II, § 20] does not apply''); *State ex rel. Harrison v. Lewis*, 10 Ohio Dec. 537 (C.P. Hamilton County 1900) (syllabus, paragraph 2) (''[t]he provisions of sec. 20, art. 2, of the constitution, that the salary of a county official cannot be increased during his term of office, apply only to compensation for duties germain [*sic*] to his office or incidental or collateral thereto, and do not apply to services rendered in an independent employment to which he is appointed by an act of the state legislature''), *aff'd* 11 Ohio Cir. Dec. 647 (Hamilton County 1901); 1960 Op. Att'y Gen. No. 1155, p. 105, at 109 to 110 (''[o]n the other hand, when a public officer is employed to render services in an independent employment not germane or incidental to his official duties, to which the law has annexed compensation, he may receive additional compensation for such services. *Moreover, a statutory provision for such additional compensation does not fall within the purview of art. 2, sec. 20 of the Constitution, prohibiting a change during an existing term of office.*' (Emphasis added)'' (quoting 32 Ohio Jur. § 162, p. 1021)); 1952 Op. Att'y Gen. No. 1082, p. 18, at 22 (quoting 43 Am. Jur. at p. 152 as follows: ''[w]here the

---

between the board of county commissioners and the county engineer. 2004 Op. Att'y Gen. No. 2004-022, at 2-186; *see also* 1990 Op. Att'y Gen. No. 90-111, at 2-502 (the Attorney General is ''unable to make findings of fact or to interpret provisions of a particular contract or agreement''). We will therefore proceed to answer your questions under the presumption that the proposed modifications will not constitute a breach of contract.

duties newly imposed upon the officer are not merely incidents of and germane to the office, but embrace a new field, and are beyond the scope and range of the office as it theretofore existed and functioned, the incumbent may be awarded extra compensation for the performance of such duties without violating a constitutional inhibition against increase of salary during the term'').

A public officer is entitled to additional compensation in such circumstances because he is invested with new responsibilities that are not reasonably related to his statutory office. *See Lewis v. State ex rel. Harrison*, 11 Ohio Cir. Dec. at 649-50; *see also* 1960 Op. Att'y Gen. No. 1155, p. 105, at 110 (a county auditor who also performs duties as an agent of the tax commissioner pursuant to R.C. 5731.43, now R.C. 5731.41, may receive additional compensation without violating Article II, § 20 because ''there can be no doubt that payments made under [R.C. 5731.43, now R.C. 5731.41] are not made for services rendered as county auditor''). These new responsibilities could not have been contemplated by the General Assembly in setting the statutory compensation of the office, nor could they have been considered by the officeholder upon entering office. Therefore, when a public officer is assigned additional duties that are neither incidental nor germane to his public office, he may receive additional compensation for performing such duties without violating Article II, § 20 of the Ohio Constitution. Conversely, when a public officer is relieved of those additional duties that are neither incidental nor germane to his statutory office, his compensation may be reduced accordingly without violating Article II, § 20 because a reduction in the salary of his statutory office has not occurred.

County Engineer's Performance of the Duties of the County Sanitary Engineer

As explained above, the current version of R.C. 315.14 authorizes a board of county commissioners to compensate the county engineer for performing duties of the county sanitary engineer. Prior to enactment of this version of R.C. 315.14, the Ohio Supreme Court addressed whether Article II, § 20 of the Ohio Constitution prohibited a county engineer from receiving additional compensation for performing such duties. *State ex rel. Mikus v. Roberts*, 15 Ohio St. 2d 253, 239 N.E.2d 660 (1968). After examining the statutory duties of a county engineer at the time, the court concluded that ''*in the absence of express statutory provision therefor*, no compensation, in addition to his fixed statutory salary, may be paid to the county engineer where the county commissioners require him to serve as county sanitary engineer.'' *Id.* at 258 (emphasis added). The court reasoned that the terms of R.C. 315.14, at that time, in addition to listing specific duties of the county engineer, provided that the county engineer '''shall perform such other duties as the board [of county commissioners] requires,''' which may include the duties of the county sanitary engineer. *Id.* at 257 (quoting former R.C. 315.14).

Following the decision in *State ex rel. Mikus v. Roberts*, the General Assembly amended the statutory duties of a county engineer such that the duties of a county sanitary engineer are now expressly excluded from the duties of a county engineer. *See* R.C. 315.08 (''[t]he county engineer shall perform for the county all

duties authorized or declared by law to be done by a registered professional engineer or registered surveyor, *except* [duties described in certain provisions of the Revised Code, including R.C. Chapters 343, 6103 and 6117, which set forth the duties of a county sanitary engineer]'' (emphasis added)); R.C. 315.14 (the county engineer ''shall perform other duties as the board [of county commissioners] requires, provided that the duties described in . . . [R.C. Chapters 343, 6103, and 6117, which set forth the duties of a county sanitary engineer,] shall be performed only pursuant to an agreement between the county engineer and the board [of county commissioners]''); *see also* 2005-2006 Ohio Laws, Part II, 2607, 2620-21 (Am. Sub. H.B. 68, eff. June 29, 2005); 1991-1992 Ohio Laws, Part III, 3534, 3536-37 (Am. Sub. H.B. 201, eff. June 30, 1991).

In light of these statutory amendments, the Attorney General concluded in 1996 Op. Att'y Gen. No. 96-025 that the General Assembly has abrogated the rule of law set forth in *State ex. rel. Mikus v. Roberts*. The 1996 opinion noted that the language of R.C. 315.14 now ''clearly and unambiguously states that the official duties of a county engineer do not include the duties of a county sanitary engineer.'' 1996 Op. Att'y Gen. No. 96-025, at 2-89. The Attorney General thus advised that ''[p]ursuant to R.C. 315.14, a board of county commissioners is authorized to enter into an agreement with the county engineer whereby the board compensates the county engineer for performing the duties of a county sanitary engineer.'' 1996 Op. Att'y Gen. No. 96-025 (syllabus).

Article II, § 20 of the Ohio Constitution Does Not Prohibit a Change in the Amount of Compensation Paid to a County Engineer for Performing Duties of the County Sanitary Engineer

With this background in mind, we will now address whether Article II, § 20 of the Ohio Constitution prohibits a board of county commissioners from reducing the amount of compensation that is paid to a county engineer for performing the duties of the county sanitary engineer. There are two potential means by which Article II, § 20 may prohibit a reduction in the compensation that a county engineer receives for performing the duties of the county sanitary engineer. First, such a reduction could be prohibited as an in-term change in the compensation of the county engineer. Second, such a reduction could be prohibited as an in-term change in the compensation of the county sanitary engineer. We will address these possibilities in turn.

A Change in the Amount of Compensation Paid to a County Engineer Pursuant to an Agreement under R.C. 315.14 Is Not an In-Term Change in the Compensation of the County Engineer

The Ohio Supreme Court has held that Article II, § 20's prohibition against in-term changes in compensation applies to the office of county engineer. *State ex rel. Mikus v. Roberts*, 15 Ohio St. 2d 253 (syllabus, paragraph 2). Therefore, Article II, § 20 prohibits any increase or decrease in the compensation paid to a county engineer during his existing term of office. *Id.* (syllabus, paragraph 3).

As explained above, however, Article II, § 20 does not prohibit a public of-

ficer from receiving additional compensation for performing duties that are neither incidental nor germane to his public office because, under such circumstances, the officer has been assigned additional responsibilities that are not reasonably related to his statutory office. When a county engineer enters into an agreement with a board of county commissioners under R.C. 315.14, he agrees to perform additional duties, those of the county sanitary engineer, that are neither incidental nor germane to his official duties as county engineer. The General Assembly has determined that the duties of a county sanitary engineer are not incidental or germane to the duties of a county engineer. *See* R.C. 315.08; R.C. 315.14; 1996 Op. Att'y Gen. No. 96-025, at 2-89 (R.C. 315.14 now "clearly and unambiguously states that the official duties of a county engineer do not include the duties of a county sanitary engineer").

Further evidence that the duties of a county sanitary engineer are not incidental or germane to the office of county engineer is that the duties of each position are set forth in separate statutory provisions. The principal duties of a county engineer are set forth throughout various chapters of the Revised Code. *See, e.g.*, R.C. 315.08; R.C. 315.13-.14; R.C. 5543.01; R.C. 5543.09; R.C. 6131.09-.10. Likewise, the principal duties of a county sanitary engineer are set forth by statute. *See, e.g.*, R.C. 343.04; R.C. 6103.05-.051; R.C. 6103.11; R.C. 6117.06-.061. The primary duties of a county engineer pertain to the construction, maintenance, and repair of county roads, bridges, culverts, and highways. *See, e.g.*, R.C. 315.08 (providing, *inter alia*, that the county engineer shall prepare all plans, specifications, and details for the construction, maintenance, and repair of bridges, culverts, and roads constructed under the authority of the board of county commissioners within and for the county); R.C. 315.13 (the county engineer shall make all emergency repairs on all roads, bridges, and culverts in the county); R.C. 5543.01(A)(1) (with limited exceptions, the county engineer has general charge of construction, reconstruction, improvement, maintenance, and repair of all bridges and highways within the county that are under the board of county commissioners' jurisdiction). On the other hand, the principal duties of a county sanitary engineer relate to assisting the board of county commissioners in the provision of clean drinking water and the proper disposal of solid waste and sewage. *See, e.g.*, R.C. 343.04 (the county sanitary engineer shall prepare a general plan of solid waste facilities for a county solid waste management district at the request of the board of county commissioners); R.C. 6103.05(A) (a board of county commissioners may have the county sanitary engineer prepare or revise as needed a general plan of water supply for a county sewer district); R.C. 6117.06(A) (a board of county commissioners may have the county sanitary engineer prepare or revise as needed a general plan of sewerage or drainage for a county sewer district). The duties of each position thus relate to different primary objectives, which further illustrates that the duties of a county sanitary engineer are not incidental or germane to the duties of a county engineer.

Because the duties of a county sanitary engineer are not reasonably related to those of a county engineer, the compensation that a county engineer receives for performing those additional duties is separate and distinct from the compensation that he receives as county engineer. *Cf. State ex rel. Harrison v. Lewis*, 10 Ohio

Dec. 537 (syllabus, paragraph 4) (''a county surveyor [now county engineer] who is required by law to perform the duties of a member of the county board of equalization, is entitled to compensation therefor, independent of and without regard to the compensation which he may receive as county surveyor'' and such compensation does not violate Article II, § 20); 1960 Op. Att'y Gen. No. 1155, p. 105, at 110 (a county auditor who also performs duties as an agent of the tax commissioner pursuant to R.C. 5731.43, now R.C. 5731.41, may receive additional compensation without violating Article II, § 20 because ''there can be no doubt that payments made under [R.C. 5731.43, now R.C. 5731.41] are not made for services rendered as county auditor''). The compensation of a county engineer is established pursuant to R.C. 325.14 and is paid monthly out of the county's general fund or from the county's share of motor vehicle license and fuel tax revenues. R.C. 325.14(A); 1994 Op. Att'y Gen. No. 94-026, at 2-120. The compensation that a county engineer receives for performing the duties of the county sanitary engineer is established pursuant to the agreement between the board of county commissioners and the county engineer and may be paid from sources other than those from which his salary as county engineer is paid. *Compare* R.C. 315.14 (compensation paid to a county engineer for performing the county sanitary engineer's duties is paid from the county general fund or from funds available under R.C. Chapters 343, 6103, or 6117), *with* R.C. 325.14(A) (the compensation of a county engineer is paid from the county general fund or the county's share of motor vehicle license and fuel tax revenues). Thus, the compensation that a county engineer receives pursuant to an agreement under R.C. 315.14 is distinguishable from the statutory compensation that he receives as county engineer.

Therefore, if the compensation that is paid to a county engineer for performing the duties of the county sanitary engineer pursuant to an agreement under R.C. 315.14 is adjusted during the county engineer's existing term of office, the compensation of the county engineer for services rendered as county engineer will have been neither increased nor decreased. Consequently, a change in the amount of compensation that is paid to a county engineer for performing the duties of the county sanitary engineer is not an in-term change in the compensation of the county engineer that is prohibited by Article II, § 20 of the Ohio Constitution.

A County Sanitary Engineer Is Not a ''Public Officer'' for Purposes of Article II, § 20 of the Ohio Constitution

That a change in the compensation paid pursuant to an agreement under R.C. 315.14 is not an in-term change in the compensation of the county engineer, however, does not end the inquiry regarding whether Article II, § 20 prohibits a board of county commissioners from changing the amount of compensation that is paid to a county engineer for performing the duties of the county sanitary engineer. If a county sanitary engineer is a ''public officer'' for purposes of Article II, § 20, this constitutional provision will prohibit any increase or decrease in the compensation that is paid to a county sanitary engineer during his existing term of office. Article II, § 20 may, therefore, prohibit an in-term change in the amount of compensation that is paid to the county sanitary engineer, whose duties, in this case, happen to be fulfilled by the county engineer pursuant to an agreement under R.C.

315.14. If, however, a county sanitary engineer is not a public officer, Article II, § 20's prohibition will not apply. *See* 1980 Op. Att'y Gen. No. 80-050, at 2-205.

The Ohio Supreme Court in *State ex rel. Landis v. Bd. of Comm'rs of Butler Cnty.*, 95 Ohio St. 157, 159-61, 115 N.E. 919 (1917), set forth the following explanation of what constitutes 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 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.

In our opinion, application of these principles to the position of county sanitary engineer leads to the conclusion that a county sanitary engineer is not a public officer for purposes of Article II, § 20.[3] A county sanitary engineer has no statutory term of office. A county sanitary engineer may either be employed by a board of county commissioners "for the time and on the terms [the board] consid-

[3] The Attorney General has previously concluded that a county sanitary engineer is not a public officer. *See* 1931 Op. Att'y Gen. No. 2864, vol. I, p. 90. In reaching this conclusion, the Attorney General reasoned that a public officer "must be elected by the electors of the county and not appointed." *Id.* at 91. While we agree with the conclusion that a county sanitary engineer is not a public officer for purposes of Article II, § 20, we do not agree with the assertion that a public officer "must be elected by the electors of the county and not appointed." *See State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29 (1916) (syllabus, paragraph 3) ("[t]he term 'officers,' as used in Section 20, Article II of the Constitution, includes both appointive and elective officers"). Therefore, we overrule 1931 Op. Att'y Gen.

ers best,'' *see* R.C. 6117.01(C), or appointed by the board of county commissioners. *See* R.C. 6117.01(A)(4)(a) (defining ''[c]ounty sanitary engineer,'' for purposes of R.C. Chapter 6117, to include ''[t]he registered professional engineer employed or appointed by the board of county commissioners''). A county sanitary engineer is not required to take an oath or give bond, nor is the compensation of a county sanitary engineer fixed by law.

Most significantly, a county sanitary engineer does not independently exercise any sovereign functions. Rather, a county sanitary engineer acts at the direction of the board of county commissioners, and such actions are generally subject to the supervision and control of the board. *See, e.g.*, R.C. 6103.02(B) (''[t]he county sanitary engineer or sanitary engineering department, in addition to other assigned duties, shall assist the board [of county commissioners] in the performance of its duties under this chapter [providing for county water supply systems] and shall be charged with other duties and services in relation to the board's duties as the board prescribes''); R.C. 6103.05(A) (a board of county commissioners may have the county sanitary engineer prepare or revise as needed a general plan of water supply, which shall be subject to the approval of the board); R.C. 6103.20(B) (a board of county commissioners may direct the county sanitary engineer to examine water supply facilities that the board is considering purchasing; the county sanitary engineer's role in such circumstances is limited to ''consultation'' with the board); R.C. 6117.06(A) (a board of county commissioners may have the county sanitary engineer prepare or revise as needed a general plan of sewerage or drainage, which shall be subject to the approval of the board); R.C. 6117.38(B) (a board of county commissioners may direct the county sanitary engineer to examine sanitary or drainage facilities that the board is considering purchasing; the county sanitary engineer's role in such circumstances is limited to ''consultation'' with the board); *see also Meister v. Kilbury*, 9 Ohio Laws Abs. 118, 120 (Ct. App. Lucas County 1930) (''[o]ur view of the law is that the sanitary engineer is merely the legally authorized statistician for the county commissioners in matters pertaining to sanitary sewers, and the act of the assessment is the act of the commissioners and of the commissioners alone. They are not bound by the report of the sanitary engineer''), *aff'd*, 122 Ohio St. 485 (1930). Consequently, a county sanitary engineer is not a public officer for purposes of Article II, § 20 of the Ohio Constitution.[4] Because a county sanitary engineer is not a public officer, Article II, § 20 does not prohibit an in-term

---

No. 2864, vol. I, p. 90 to the extent that it advises that a public officer, for purposes of Article II, § 20, must be elected.

[4] Article II, § 20 provides, in part, that ''[t]he general assembly, in cases not provided for in this constitution, *shall fix . . . the compensation of all officers*.'' (Emphasis added.) R.C. 315.14 authorizes a board of county commissioners to ''determine the compensation'' to be paid to the county engineer for performing the duties of the county sanitary engineer. R.C. 6117.01(C) authorizes a board of county commissioners to ''provide for and pay the compensation of the county sanitary engineer.'' If it were determined that a county sanitary engineer is a public officer for purposes of Article II, § 20, these statutes would appear to be an unconstitutional delegation of the General Assembly's power to fix the compensation of pub-

change in the amount of compensation that is paid to a county sanitary engineer. Thus, a change in the amount of compensation paid to a county engineer for performing duties of the county sanitary engineer pursuant to an agreement under R.C. 315.14 is not prohibited as an in-term change in the compensation of the county sanitary engineer.

Based on the foregoing, it is our opinion that Article II, § 20 of the Ohio Constitution does not prohibit a board of county commissioners from changing the amount of compensation that is paid to a county engineer for performing the duties of the county sanitary engineer. The compensation that is paid to a county engineer for performing the duties of the county sanitary engineer is distinguishable from his statutory compensation as county engineer. Therefore, a change in the compensation paid to a county engineer for performing the duties of the county sanitary engineer is not an in-term change in the compensation of the county engineer that is prohibited by Article II, § 20 of the Ohio Constitution. Additionally, because a county sanitary engineer is not a public officer for purposes of Article II, § 20, the constitutional prohibition against in-term compensation changes does not apply to a county sanitary engineer.

A Board of County Commissioners Is Not Authorized to Structure an Agreement under R.C. 315.14 Such That the County Engineer Performs the Duties of the County Sanitary Engineer as an Independent Contractor

Next, you ask whether the board of county commissioners may renegotiate its existing agreement with the county engineer to provide that the county engineer performs the duties of the county sanitary engineer as an independent contractor. As a creature of statute, a board of county commissioners may exercise only those powers explicitly conferred by statute or necessarily implied by those powers that are expressly granted. 2010 Op. Att'y Gen. No. 2010-030, at 2-221. The language of R.C. 315.14 does not expressly authorize a board of county commissioners to hire the county engineer to perform the duties of the county sanitary engineer as an independent contractor. Whether such authority may be implied requires us to examine general principles of law regarding independent contractors.

The determination whether a person serves as an employee or independent

---

lic officers. Our conclusion here, that a county sanitary engineer is not a public officer, instead harmonizes the provisions of R.C. 315.14 and R.C. 6117.01(C) with Article II, § 20. *See Co-Operative Legislative Comm. of the Transp. Bhds. v. P.U.C.O.*, 177 Ohio St. 101, 202 N.E.2d 699 (1964) (syllabus, paragraph 2) (''[w]here reasonably possible, a statute should be given a construction which will avoid rather than a construction which will raise serious questions as to its constitutionality''); 1981 Op. Att'y Gen. No. 81-100, at 2-377 (''[i]t is not a function of this office, which is part of the executive branch of government, to opine on the constitutionality of state statutes . . . . If a statute is ambiguous, this office will choose a constitutional interpretation over one which appears to be unconstitutional'').

contractor "turns primarily on the question whether the employer retains the right to control the mode and manner of work to be performed." 1983 Op. Att'y Gen. No. 83-037, at 2-140 to 2-141. An employee is subject to the employer's direction and supervision with regard to the means, method, and manner of performing a function. 2009 Op. Att'y Gen. No. 2009-035, at 2-244. "In contrast, an independent contractor is given the responsibility of performing a function and is entrusted with the responsibility of determining the means, method, and manner of performance." *Id.*

"Generally, whether a person performs his services as a 'county employee or an independent contractor is primarily a factual issue, which [the Attorney General] cannot properly resolve by way of opinion.'" 2007 Op. Att'y Gen. No. 2007-046, at 2-454 (quoting 1987 Op. Att'y Gen. No. 87-082, at 2-549). In this instance, however, the relevant statutory provisions indicate that a board of county commissioners maintains a high degree of supervision and control over the county sanitary engineer, thus foreclosing the possibility of hiring an independent contractor to perform the duties of the county sanitary engineer. As explained in response to your first question, a county sanitary engineer is statutorily required to act at the direction of the board of county commissioners. *See, e.g.*, R.C. 343.01(D) (the sanitary engineer of a county maintaining a county solid waste management district "shall assist the board of county commissioners . . . in the performance of [its] duties under [R.C. Chapter 343] and [R.C. 3734.52-.575] and shall be charged with any other duties and services in relation thereto that the board prescribes"); R.C. 6103.02(B) (the county sanitary engineer "shall assist the board [of county commissioners] in the performance of its duties under [R.C. Chapter 6103] and shall be charged with other duties and services in relation to the board's duties as the board prescribes"); R.C. 6103.20(B) (the county sanitary engineer, at the direction of the board of county commissioners, shall examine water supply facilities that the board is considering acquiring).

In many instances, a board of county commissioners is required to review and approve the county sanitary engineer's actions before they take effect. *See, e.g.*, R.C. 6103.05 (a board of county commissioners may have the county sanitary engineer prepare or revise as needed a general plan of water supply, which shall be subject to the approval of the board, and a schedule of tentative assessments); R.C. 6103.051 (if a board of county commissioners orders any part of a tentative assessment prepared by the county sanitary engineer pursuant to R.C. 6103.05 to be deferred, the county sanitary engineer "shall forthwith revise the list of tentative assessments to accord with the order of the board") R.C. 6117.01(C) (a board of county commissioners "may authorize the county sanitary engineer to employ necessary assistants upon terms fixed by the board"); R.C. 6117.07 (plans or assessments prepared by the county sanitary engineer in connection with a county sewer district may be amended by the board of county commissioners; the board may cause the county sanitary engineer to make such revisions). Additionally, in counties where a sanitary engineering department has been created, R.C. 6117.01(C) requires the department, which is headed by the county sanitary engineer, to be under the general supervision of the board of county commissioners. Due to the

high degree of supervision and control that a board of county commissioners is required to exercise over the county sanitary engineer, we are of the opinion that a board of county commissioners may not hire a county engineer to perform the duties of the county sanitary engineer as an independent contractor.[5] *See* 2009 Op. Att'y Gen. No. 2009-035, at 2-244 (an independent contractor "is entrusted with the responsibility of determining the means, method, and manner of performance").

Authority to Hire Another County Sanitary Engineer

Your third question asks whether the board of county commissioners may terminate its agreement with the county engineer and hire another registered professional engineer to fulfill the duties of the county sanitary engineer. As explained in note 2, *supra*, unilateral termination of the existing agreement may constitute a breach of contract. Assuming, however, that such termination does not constitute a breach of contract, we are of the opinion that the board of county commissioners may hire another registered professional engineer to fulfill the duties of the county sanitary engineer, subject to a restriction found in R.C. 6117.01(C).

R.C. 6117.01(A)(4) defines "[c]ounty sanitary engineer," for purposes of R.C. Chapter 6117, which permits the establishment of county sewer districts, as either:

> (a) The registered professional engineer employed or appointed by the board of county commissioners to be the county sanitary engineer as provided in this section; [or]
>
> (b) The county engineer, if, for as long as and to the extent that

[5] In 1956 Op. Att'y Gen. No. 6196, p. 26, at 29, the Attorney General advised that, under the provisions of former R.C. 6117.01, where a county sanitary engineer is "*appointed* there is created the usual employer-employee relationship similar to that of master and servant, and [] where a sanitary engineer is *employed* 'on such terms' as the board 'deems best,' the terms of employment *may* be such as to create the relationship of independent contractors between the parties." Since the issuance of the 1956 opinion, the General Assembly has amended R.C. 6117.01 on several occasions, resulting in the alteration and deletion of much of the language relied upon by the Attorney General in the 1956 opinion. In light of these amendments and our review of the applicable statutes governing county sanitary engineers, we cannot endorse the 1956 opinion's conclusion that a board of county commissioners may hire a county sanitary engineer as an independent contractor. We are of the opinion that the language in R.C. 6117.01(C) authorizing a board of county commissioners to employ a person as county sanitary engineer "for the time and on the terms [the board] considers best" refers to the board of county commissioners' authority to set the general terms and conditions of employment, including the hours to be worked, duties to be performed, and compensation to be paid. Given the degree of supervision and control that a board of county commissioners is required to maintain over a county sanitary engineer, we do not interpret this language as authorizing a board of county commissioners to create an independent contractor relationship with the county sanitary engineer.

> engineer by agreement entered into under [R.C. 315.14] is retained to discharge duties of a county sanitary engineer under this chapter.

The term "[c]ounty sanitary engineer" is defined in a similar fashion for purposes of R.C. Chapter 6103, which permits the establishment of county water supply systems. *See* R.C. 6103.01(F). These definitions of "county sanitary engineer" indicate that the General Assembly intends for counties to have the option to either (1) hire a registered professional engineer other than the county engineer to perform the duties of the county sanitary engineer or (2) assign the performance of such duties to the county engineer by means of an agreement under R.C. 315.14. *See State ex rel. Mikus v. Roberts*, 15 Ohio St. 2d at 257 ("[t]he effect of [former R.C. 315.14 and R.C. 6117.01] is to provide the county commissioners with an option either to assign the duties of the sanitary engineer to the county engineer or to employ another person, who is a competent sanitary engineer, to perform those duties"). Thus, a board of county commissioners may hire a registered professional engineer other than the county engineer to perform the duties of the county sanitary engineer. *See* R.C. 6103.01(F); R.C. 6117.01(A)(4).

However, R.C. 6117.01(C) provides, in part, that:

> [p]rior to the initial assignment of drainage facilities duties to the county sanitary engineer, if the county sanitary engineer is not the county engineer, the board [of county commissioners] first shall offer to enter into an agreement with the county engineer pursuant to [R.C. 315.14] for assistance in the performance of those duties of the board pertaining to drainage facilities, and the county engineer shall accept or reject the offer within thirty days after the date the offer is made. (Emphasis added.)

Thus, if the board of county commissioners hires another registered professional engineer to perform the duties of the county sanitary engineer, the board will be required to offer to enter into an agreement with the county engineer pursuant to R.C. 315.14 for assistance in performance of any of the board's duties related to drainage facilities. The county engineer will then have the option of accepting or rejecting the offer within thirty days. Aside from this restriction, the board of county commissioners may hire a registered professional engineer other than the county engineer to fulfill the duties of the county sanitary engineer.

R.C. 315.14 Does Not Require a Written Agreement between a Board of County Commissioners and a County Engineer, But a Signed Writing May Be Required by Ohio's Statute of Frauds

Finally, you ask whether the fact that no written agreement exists between the board of county commissioners and the county engineer affects the analysis of the foregoing questions. It does not. The terms of R.C. 315.14 do not require an agreement between a board of county commissioners and a county engineer to be in writing. R.C. 1335.05, Ohio's Statute of Frauds, specifies, as a general rule, when contracts must be evidenced by a signed writing to be enforceable in a court of law. *See* R.C. 1335.05 ("[n]o action shall be brought whereby to charge the defendant,

upon [certain enumerated categories of contracts,] unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith''). Among the contracts that must be evidenced by a signed writing to be enforceable in a court of law are those agreements ''not to be performed within one year from the making thereof.'' *Id.* Therefore, whether Ohio's Statute of Frauds requires an agreement pursuant to R.C. 315.14 to be in writing, or otherwise evidenced by a signed writing, depends upon the terms of the particular agreement. As the Attorney General is not authorized to interpret the terms of a particular contract or agreement, we are unable to advise you whether the agreement between the board of county commissioners and the county engineer must be in writing, or otherwise evidenced by a signed writing, to be enforceable in a court of law. *See* 1990 Op. Att'y Gen. No. 90-111, at 2-502.

Generally speaking, if an agreement under R.C. 315.14 specifies that a county engineer shall serve as the county sanitary engineer for a length of time that exceeds one year, Ohio's Statute of Frauds will require the agreement to be evidenced by a signed writing if it is to be enforced in a court of law. *See* R.C. 1335.05. If, however, an agreement under R.C. 315.14 specifies that a county engineer shall serve as the county sanitary engineer for a duration of less than one year or is silent as to the length of time that the county engineer shall serve as the county sanitary engineer, Ohio's Statute of Frauds will not apply. *See Sherman v. Haines*, 73 Ohio St. 3d 125, 127, 652 N.E.2d 698 (1995) (''[f]or over a century, the 'not to be performed within one year' provision of the Statute of Frauds, in Ohio and elsewhere, has been given a literal and narrow construction. The provision applies only to agreements which, by their terms, cannot be fully performed within a year; and not to agreements which may possibly be performed within a year, thus, where the time for performance under an agreement is indefinite . . . the agreement does not fall within the Statute of Frauds''). Even when a written agreement is not required by Ohio's Statute of Frauds, we recommend that an agreement under R.C. 315.14 be in writing in order to document the rights and obligations of the parties and minimize future disputes over the terms and conditions of the agreement.

Finally, we would be remiss if we failed to advise that an agreement under R.C. 315.14 should specify the length of time that a county engineer will be responsible for performing the duties of the county sanitary engineer.[6] If an agreement under R.C. 315.14 is silent as to the length of time that a county engineer shall

[6] Our recommendation that an agreement under R.C. 315.14 specify the period of time during which the county engineer will perform the duties of the county sanitary engineer does not affect our conclusion that a county sanitary engineer is not a public officer for purposes of Article II, § 20 of the Ohio Constitution. 2013 Op. Att'y Gen. No. 2013-016, slip op. at 8-10 (one of the factors in determining whether a position is a public office is whether the position has durability of tenure). A county sanitary engineer has no statutorily prescribed term of office. Further, even when an agreement under R.C. 315.14 establishes the term that a county engineer will perform the duties of the county sanitary engineer, the other attributes of a public office will not be present. 2013 Op. Att'y Gen. No. 2013-016, slip op. at 8-10.

perform the responsibilities of the county sanitary engineer, the validity of the agreement may be called into question by purporting to extend beyond the life of the existing board of county commissioners. *See State ex rel. Allen v. Lutz*, 111 Ohio St. 333, 338-39, 145 N.E. 483 (1924) (contracts entered into by a board of county commissioners that extend beyond the term of the existing board are not looked upon with favor); *Benefit Servs. of Ohio, Inc. v. Trumbull Cnty. Comm'rs*, Trumbull App. No. 2003-T-0045, 2004-Ohio-5631, at ¶36 (same as previous parenthetical). In *State ex rel. Allen v. Lutz*, the court addressed whether G.C. 6602-14, which limited the maximum compensation of a county sanitary engineer, unconstitutionally impaired the contractual rights of a county sanitary engineer who had, prior to G.C. 6602-14's enactment, agreed to serve in that position for an indefinite duration. The court held that the contract had not been unconstitutionally impaired by enactment of G.C. 6602-14, finding that "this contract ignored the statutory requirement [of G.C. 6602-1, now R.C. 6117.01] as to 'time or times [that the person would serve as sanitary engineer],' and was so indefinite in that regard that it transcended the spirit as well as the letter of the statute." *State ex rel. Allen v. Lutz*, 111 Ohio St. at 339. In holding that the county sanitary engineer's compensation was subject to the limitation found in G.C. 6602-14, the court noted that:

> the general rule is that such contracts, extending beyond the term of the existing board, and employment of agents or servants of the county for such period, thus tying the hands of a succeeding board, are not looked upon with favor unless the necessity or some special circumstances show that the public good requires such contracts to be made.

Id. For this reason, an agreement under R.C. 315.14 should designate the time period during which the county engineer will perform the responsibilities of the county sanitary engineer, and that period of time should not extend beyond the term of office of the board of county commissioners that has executed the agreement.[7]

[7] The composition of a board of county commissioners is subject to change at least every two years. *See* R.C. 305.01 (members of a board of county commissioners are elected to serve staggered four-year terms; one position on the board of county commissioners shall be filled by election in November 1974 and quadrennially thereafter, and two positions on the board shall be filled by election in November 1972 and quadrennially thereafter). To avoid having an agreement under R.C. 315.14 extend beyond the term of office of any of the members of the board of county commissioners who executed the agreement, it may be prudent for the board to ensure that the agreement contains a provision allowing for review and renegotiation of the agreement for a period of time after each new member of the board of county commissioners commences his term of office. *Cf.* R.C. 329.02 (when a board of county commissioners enters into a written employment contract with the county director of job and family services, "the contract shall be subject to review and renegotiation for a period of thirty days, from the sixtieth to the ninetieth days after the beginning of the term of any newly elected [county] commissioner").

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Article II, § 20 of the Ohio Constitution does not prohibit a board of county commissioners from changing the amount of compensation that is paid to a county engineer for performing the duties of the county sanitary engineer. (1931 Op. Att'y Gen. No. 2864, vol. I, p. 90, overruled in part.)

2. A board of county commissioners is not authorized to structure an agreement with the county engineer under R.C. 315.14 such that the county engineer performs the duties of the county sanitary engineer as an independent contractor. (1956 Op. Att'y Gen. No. 6196, p. 26, overruled in part.)

3. A board of county commissioners is authorized to hire a registered professional engineer other than the county engineer to perform the duties of the county sanitary engineer. However, when the county sanitary engineer is a registered professional engineer other than the county engineer, R.C. 6117.01(C) requires that prior to the initial assignment of drainage facilities duties to the county sanitary engineer, a board of county commissioners first offers to enter into an agreement with the county engineer pursuant to R.C. 315.14 for assistance in the performance of those duties of the board pertaining to drainage facilities.

4. An agreement pursuant to R.C. 315.14 between a board of county commissioners and a county engineer is not required by the terms of R.C. 315.14 to be in writing. Depending upon the terms of the particular agreement, R.C. 1335.05, Ohio's Statute of Frauds, may require the agreement to be evidenced by a document signed by the party to be charged to be enforceable in a court of law.