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AUDITOR OF STATE: 1. TENURE OF OFFICE "DURING THE PLEASURE" NOT UNDER AN "EXISTING TERM"; 2. TENURE OF OFFICE "UNTIL HIS SUCCESSOR IS ELECTED OR APPOINTED AND QUALIFIED" HOLDING OVER IS NOT FOR AN "EXISTING TERM"—OHIO CONSTITUTION, ARTICLE II, SECTION 20—CHANGE IN SALARY "DURING HIS EXISTING TERM"—3.01 RC.

SYLLABUS:

1. An officer whose tenure is "during the pleasure" of the appointing authority does not hold office during an "existing term" within the meaning of Section 20, Article II, Ohio Constitution and the inhibition therein of a change in salary "during his existing term" has no application to the encumbent of such office.

2. An officer whose fixed statutory term of office has expired and who is continued in office by operation of law, under Section 3.01, Revised Code, "until his successor is elected or appointed and qualified" does not, during such period of continuance in office hold such office for any fixed or definite term, nor for an "existing term" within the meaning of Section 20, Article II, Ohio Constitution, and the inhibition therein against a change in salary "during his existing term" has no application during such period of continued tenure.

Columbus, Ohio, March 4, 1957

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

I have your request for my opinion, which reads as follows:

"Demand has been made upon me by certain officials of the State for salaries fixed by Amended Senate Bill No. 1, 102nd General Assembly.

"This enactment increased the salaries of certain officials as listed in Sections 141.03, 2965.07, 4121.05, 4121.12, 4141.06 4301.07 and 5703.09 of the Revised Code.

"In view of the fact that these positions have not been filled by the present Governor in some instances and were filled at a date subsequent to the enactment of Amended Senate Bill No. 1 with the incumbents holding over from their previous appoint-

ments. In those cases provided for by R. C. 141.03 the holders of the positions serve at the pleasure of the Governor and hold their offices during the pleasure of the Governor.

"R. C. 3.01 states that:

"'A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the Constitution or laws of this State.'

"Article II, Section 20 of the Ohio Constitution provides:

"'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.'

"An opinion is respectfully requested:

"1. Whether or not an appointive official serving 'at the pleasure of the Governor' whose term extends beyond that of the appointing Governor is by virtue of that continuance an appointee of the succeeding Governor.

"2. Whether or not, assuming that you hold that he is the appointee of the succeeding Governor, he would be entitled to any increase in salary by reason of a change in the statutory enactment of a salary increase for the position so held.

"3. It is assumed that for those members of boards and commissions whose appointment was for a definite term that regardless of the salary fixed by Amended Senate Bill No. 1, such members would receive only the salary set for the position at the time of the appointment."

Your query whether an incumbent who continues in office as provided in Section 3.01, Revised Code, may be deemed an appointee of the succeeding Governor suggests your notion that an officer who serves at the pleasure of the Governor, as provided in Section 121.03, Revised Code, is deemed to serve a "term" coincident with that of the officer by whom he is appointed, and that he begins to serve a new "term" under that officer's successor when he thus continues in office.

I cannot subscribe to this view for the reason that throughout his tenure, whether during the term of the appointing officer or of that of his successor the incumbent in such case is holding office "during the pleasure" of the appointing authority and thus cannot be said to hold office during a "term" which is necessarily related to that of the officer by whom he is appointed, or by whose sufferance he is permitted to continue in office.

The real question, rather, is whether such officer holds office during a "term" at all, and specifically whether he holds during an "existing term" within the meaning of the Constitution.

This question seems not to have been decided judicially in Ohio but the authorities elsewhere appear quite generally to hold that such an incumbent does not hold during a "term."

In 67 Corpus Juris Secundum, 196, Section 43, it is said:

> "Where the term of office is not fixed by law, the officer holds at the will of the appointing power, and strictly speaking has no term of office."

As to the application of a constitutional limitation of the sort here involved we find this statement in 67 Corpus Juris Secundum, 344, Section 95:

> "Constitutional prohibitions against changing the compensation of an officer during his term apply to officers having fixed terms, and, as a rule, only to officers having fixed and definite terms. Accordingly, such a prohibition does not apply to an officer holding at the pleasure of the appointing authority."

The Ohio courts have, however, had occasion to consider the effect of a statutory limitation of the sort here involved, as now set out in Section 731.13, Revised Code, formerly Section 4219, General Code. This section reads in part:

> "The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk, or employee is elected or appointed."

This language in substance was formerly found in Section 1717, Revised Statutes and was the subject of consideration in State *ex rel.* Miller v. Massillon, 2 C. C., N.S., 167, (1904). In the opinion in the case there are these statements:

> "The statute now applies to cases where there is an increase during the term. The word 'term' has significance, as we think, under that section of the statute. It simply means to limit. That is, during the period that the office is limited, during that period his salary shall not be increased. But in this case there is no limit fixed by law. It is at the pleasure of the board of health that gives the health officer his position. It is their pleasure. *It is not a term, for the reason there is no limit to it.* It may be

likened unto a tenancy at will, not a term, because it has no limitation. Therefore, it would be difficult to bring such an employe within the terms of Section 1717, Revised Statutes, prohibiting an increase of salary of an officer during his term, whether he be elected or whether he be appointed. * * *

"* * * His salary is at the will of the board of health. His term of office is at their will; they may terminate it at their pleasure.

"Then the question will arise, if that be so, does such a person hold the office for a term? Is there any limit to it, to which he may claim by virtue of his appointment? We think not.

"It being then exclusively within the discretion and power of the board of health to fix his salary, there is no reason why it may not be changed at any time at the pleasure of the board, whenever necessity would seem to require it. * * * "

(Emphasis added.)

In Mellinger v. State, 16 Ohio Law Abs., 3, (1933), there is this statement by Judge Pollock:

"* * * the question presented here is whether the city police prosecutor would come under the provisions of Section 4213 G. C., which provides that an officer's salary should not be increased or decreased during his term, whether it applies to a person appointed to an official position without a term being fixed and defined and subject to the will of the appointing power.

"In Words and Phrases, Volume 8, page 6920, they define, or rather refer, to the word 'term' as follows:

" 'The word "term" when used with reference to the tenure of office ordinarily refers to a fixed and definite term and does not apply to an appointive office held at the pleasure of the appointing power."

"Then the same proposition in reference to this subject in Corpus Juris, Vol. 46, page 964, where it is said:

" 'Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has in the strict meaning of the word no "term" of office.' "

The holding in that case as indicated in the first paragraph of the headnotes, is as follows:

"A city police prosecutor whose term of appointment is subject to the will of the appointing power is not protected against a change in salary by the provision of Section 4213 G. C."

In the Ferris case supra, the court considered but refused to follow a contrary "holding" in State, *ex rel.* v. Painesville, 13 C. C., N. S., 577; affirmed without report in 85 Ohio St., 483.

All of the foregoing decisions were discussed at length in Opinion No. 5818, Opinions of the Attorney General for 1943, page 82. Because of the compelling logic evinced in the treatment of the question in that opinion, I quote from it somewhat at length, as follows:

> "Generally speaking, the word 'term' connotes a definite period. Webster calls attention to the fact that its Latin derivation is from 'terminus', meaning 'end', and he defines the word as a 'limited or definite extent of time'.
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> "In Words and Phrases, Vol. 41, p. 390, a number of decisions are cited showing that 'term of office' means a fixed and definite time' among others are State v. Rogers, 93 Mont., 355, 18 Pac. 2nd, 617; Suverkrubbe v. Ft. Calhoun, 127 Nebr., 472, 256 N. W., 47. No decisions are noted which are inconsistent with that interpretation. These words were so construed in a number of cases cited relative to constitutional provisions against changes of salary during 'term of office', viz. State, ex rel. v. Board of Commissioners, 29 N. M., 209, 31 A. L. R., 1310; Bayley v. Garrison, 190 Cal., 690, 214 Pac. 871. By the same authority, cases are quoted in support of the proposition that 'term of office' is not to be confused with 'tenure of office'. State v. Young, 127 La., 102, 67 So., 241; Halbrook v. Board, 8 Cal. 2nd, 158, 64 P. 2nd, 430.
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> "In 43 Am. Jur., under the heading 'Public Office', Section 149, it is said:
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> " 'The connotation of "term" as applied to an office is that of a fixed and definite period. The term is distinct from the "tenure" of an office.'
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> "In the case of State, ex rel. v. Board of Commissioners, 9 N. M., 209, it was held:
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> " 'Sec. 27 of Article 4 of the Constitution prohibits increasing or diminishing the compensation of an officer during his term of office.'
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> "This prohibition applies to officers who have a definite and fixed tenure of office, and does not embrace those who hold their offices at the pleasure of the appointing power."
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> "Likewise, in Bayley v. Garrison, 190 Cal., 690, the syllabus is as follows:
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> " 'The inhibition of Constitution, Article 11, Section 9, providing that salary of a public officer shall not be increased

during his term of office, applies only to officers who have a fixed and definite term, and does not preclude the increase of salary of a deputy holding office at the pleasure of his principal; such deputy having no term of office within the meaning of the constitutional provision.'

"Strangely enough the question of the right of a municipal council to change, either by increase or decrease, the salary of its police officers and firemen after they have been appointed and have entered on their duties, does not seem to have been the subject of decision by the Supreme Court of Ohio, and few lower court decisions are found directly on the subject.

"In the case of State, ex rel. v. Painesville, 13 C. C. N. S., 577—affirmed without report 85 O. S., 483—I find the following syllabus:

" '1. A duly appointed patrolman of the police department of a city is an officer within the meaning of the laws of Ohio.'

" '2. A city council has no power to increase or diminish the salary of a police officer, appointed under the civil service provisions of the municipal code, during the term for which he was appointed which is during good behavior.'

"When one reads the statement of facts in this case, one cannot avoid wondering why the court used a considerable amount of space, first in finding that a patrolman is an officer and second in holding that his office fell within the terms of the statute. The statute as it read then was to the same effect as Section 4213, and related not only to officers but to all employees of a city.

"It appears from the relator's petition that he was a patrolman who entered the police department at a salary previously fixed at $720.00; that thereafter the council passed an ordinance increasing his salary to $840.00; that still later the council passed an ordinance reducing his salary to the original sum of $720.00. His action was to compel the payment of the higher salary. In passing on a demurrer to his petition, it plainly made no difference whether the court held that the city council could or could not increase or diminish the salary of his office. If the council could not reduce his salary because of the statute, plainly it could not have increased it in the first place. If, on the other hand, council could have increased the salary, it had the same right to reduce it. In either event he had no cause of action.

"The court said in opening its discussion that the case was an amicable proceeding to test the right of council to raise and lower the patrolman's salary. The court devoted most of the decision to showing that a patrolman is an officer within the meaning of the statute.

"Referring to the matter of 'term of office' of patrolmen, the court said at page 583:

" 'But the increasing or diminishing of the salary of an officer or employe is limited to the term for which he is appointed, and it is suggested that a patrolman is not appointed for any term. If this be so, it would seem that he might be discharged at any time without violation of any statute and his place filled by another appointee. But in view of the fact that a patrolman once appointed serves until he is removed for cause, it necessarily follows *that he is appointed for a term to-wit, for that period of time during which he is permitted to hold his office.*"

(Emphasis mine.)

"This holding seems to be out of line with the general rule to which I have already referred.

"Another circuit court took a different view of this matter. In the case of State, ex rel. v. Massillon, 2 C. C., N. S., 167, it was held:

" 'A health officer does not come within the purview of Section 1717, prohibiting an increase of salary of an officer during his term.'

"Discussing the character of the position of health officer, the court said at page 168:

" 'The word "term" has significance, as we think, under that section of the statute. It simply means to limit. That is, during the period that the office is limited, during that period his salary shall not be increased. But in this case there is no limit fixed by law. It is at the pleasure of the board of health that gives the health officer his position. It is their pleasure. *It is not a term, for the reason there is no limit to it.* It may be likened unto a tenancy at will, not a term, because it has no limitation. Therefore, it would be difficult to bring such an employe within the terms of Section 1717, Revised Statutes, prohibiting an increase of salary of an officer during his term, whether he be elected or whether he be appointed.' (Emphasis mine.)

"In two Nisi Prius cases there are well considered opinions rendered subsequent to the case of State, ex rel. v. Painesville, supra, holding contrary to the syllabus of that case. One is the case of State, ex rel. v. Bish, 12 N. P., N. S., 369, where it is held:

" 'Policemen and firemen do not hold their positions for a fixed and definite term, and hence we are not subject to the provisions of Section 4213 P. & A. Anno. General Code, which forbids the increase or diminishing of salaries of officers, clerks or employes of a municipality during the term for which they were appointed or elected."

"The court refers to the Painesville case at length, criticizing it rather caustically and pointing out that no matter which way the court ruled on the question before it, the relator was bound to be the loser. This decision was by Judge Sprigg of the Common Pleas Court of Montgomery County. A few days later a decision was rendered by Judge Lawrence of the Common Pleas Court of Cuyahoga County, in the case of State v. Coughlin, 12 N. P., N. S., 419, the syllabus being as follows:

" 'Members of the police and fire departments of a municipality are not appointed for a "term" within the meaning of Section 4213, P. & A. Anno. General Code, and having no fixed or definite term the restriction as to changes in salaries does not apply to them, and council has power to increase or diminish their salaries after appointment.'

"The court, referring to the several ordinances involved in the Painesville case, says at page 422:

" 'It makes no difference in the result whether it be said that the ordinance of December 18, 1907, was valid, or that it was invalid. If it was valid, it was repealed by the ordinance of January 12, 1910; and if it was invalid, it never had any legal operation. In neither case could the relator have any lawful claim based thereon.'

" 'So, as it seems to me, the action of the Supreme Court can not be considered as any controlling authority on the question here involved, because the case was not reported, and a decision on the point in controversy was not necessarily passed upon by the judgment of affirmance.' "

The first paragraph of the syllabus in the 1943 opinion states the ruling therein on this point as follows:

> *"A village marshal appointed pursuant to Section 4384 of the General Code holds his office until removed for cause, and does not hold for a term* within the meaning of Section 4219, General Code, providing that the compensation of an officer, clerk or employee may not be increased or diminished during the term for which he may have been elected or appointed."
>
> (Emphasis added.)

I find myself in complete agreement with the writer of the 1943 opinion, *supra,* and I can perceive no reason why the same reasoning is not applicable with equal force to the interpretation of the expression "during his existing term" as employed in Section 20, Article II, Ohio Constitution.

Moreover, I find that this view is strongly supported by the circumstances, as disclosed by the Constitutional Debates of 1851, in which

the language in question was placed in the Constitution. Section 20, Article II, as adopted in that Convention, reads 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." (Emphasis added.)

This provision as originally presented to the constitutional convention of 1851, was set out in Section 16, Article I, of the draft brought before the convention for consideration. By referring to 2 Debates, page 561, we find that it was there presented for consideration in the following language:

> "The General Assembly shall fix by law the term of office, and the compensation of all officers not otherwise fixed in this constitution, provided that no change therein shall affect the incumbent *then in office for the term of office for which he shall have been elected or appointed."* (Emphasis added.)

In later considering this draft the convention, by a series of amendments or changes described in 2 Debates, page 577, changed the wording so as to read as follows:

> "The General Assembly shall fix by law, the term of office, and the compensation of all officers, not otherwise fixed in this constitution, provided that no change therein shall affect the salary of the incumbent then in office *during his continuance in office."* (Emphasis added.)

In a still later consideration by the convention, 2 Debates, page 664, an amendment was adopted whereby all of the above language following the word "incumbent" was stricken out and there was inserted in lieu thereof, the following language:

> "* * * *during his official term,* unless such office be abolished." (Emphasis added.)

In a subsequent amendment the word "official" was deleted and the word "existing" was substituted for it.

It seems clear that the meaning of the expression "during his continuance in office" would have been such as to make this constitutional limitation clearly applicable to offices where the incumbent serves for no stated term but rather serves at the pleasure of the appointing authority.

Because of the necessity of giving some effect to the change in this language, and because the only logical effect which could be given to the last changes thus described is to narrow the meaning of the language, we may conclude that the expression "during his existing term" has reference to terms of a stated period of time during which the officer concerned has a legal right to serve independently of the pleasure of the appointing authority, and more precisely, to the particular term in which the legislative change occurred.

For these reasons I conclude that the limitation here in question is without application to the incumbents of any of the offices listed in Section 121.03 (A), Revised Code, who hold their offices indefinitely "during the pleasure of the governor."

We now come to a somewhat more difficult problem, i.e., the application of this constitutional limitation to those officers, appointed to a definite statutory term, who continue in office after expiration of such term, by virtue of Section 3.01, Revised Code, and where a legislative change in the salary of the office is enacted during such period of continuance in office. A search of the authorities fails to disclose any ruling directly on this point, judicial or otherwise. In this situation it becomes necessary to apply the rationale of the decisions in somewhat related cases and of those bearing indirectly on the point here involved.

In 43 American Jurisprudence, 21, 22, Section 164, it is said:

> "* * * The period between the expiration of an officer's term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed constitutional or statutory period."

In State, *ex rel.* Glander v. Ferguson, 148 Ohio St., 581, it was remarked by Judge Matthias:

> "It clearly follows that, unless otherwise expressly provided, the time of holding over by an elected or appointed officer is a continuation of the old term and not a part of a new term."

Here it is necessary to bear in mind, however, that the interregnum tenure provided in Section 3.01, Revised Code, even though it be a part of, or a continuation of the old term, is nonetheless neither fixed nor definite in its duration. Hence, it cannot fall within the strict definition of "term" as pointed out in the authorities hereinbefore noted.

As a practical matter, such a tenure does not greatly differ from that involved in serving "during the pleasure'" of the appointing authority for it is apparent that that authority can terminate such tenure at will by making a new appointment.

It is my view, therefore, that because such tenure is neither fixed nor definite in its duration it cannot be regarded as being an "existing term" within the meaning of Section 20, Article II, Ohio Constitution.

Accordingly, in specific answer to your inquiry it is my opinion that:

1. An officer whose tenure is "during the pleasure" of the appointing authority does not hold office during an "existing term" within the meaning of Section 20, Article II, Ohio Constitution and the inhibition therein of a change in salary "during his existing term" has no application to the incumbent of such office.

2. An officer whose fixed statutory term of office has expired and who is continued in office by operation of law, under Section 3.01, Revised Code, "until his successor is elected or appointed and qualified" does not, during such period of continuance in office hold such office for any fixed or definite term, nor for an "existing term" within the meaning of Section 20, Article II, Ohio Constitution, and the inhibition therein against a change in salary "during his existing term" has no application during such period of continued tenure.

Respectfully,
WILLIAM SAXBE
Attorney General