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MUNICIPAL COURT ACT—AMENDED SENATE BILL 14, 99TH GENERAL ASSEMBLY—SECTIONS 1581 THROUGH 1617 G. C. —JUDGE, MUNICIPAL COURT—ON AND AFTER JANUARY 1, 1952 DESIGNATED OR SELECTED PRESIDING JUDGE— SECTION 1589 G. C.—ENTITLED TO ADDITIONAL FIVE HUNDRED DOLLARS, SECTION 1591 G. C. ALTHOUGH ELECTED PRIOR TO ENACTMENT OF ACT.

SYLLABUS:

Under the provisions of the Municipal Court Act, Sections 1581 to 1617, inclusive, General Code, enacted by the 99th General Assembly by the passage of Amended Senate Bill No. 14, a judge of a municipal court who, on and after January 1, 1952 is designated or selected as the presiding judge pursuant to Section 1589, General Code, is entitled, during his term of office as such presiding judge, to the additional five hundred dollars provided by Section 1591, General Code, although elected judge of a municipal court prior to the enactment of the Municipal Court Act and continued in the office of municipal judge during his existing term of such office by the Municipal Court Act.

Columbus, Ohio, January 18, 1952

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion as to the proper amount of compensation to be received, under the new Municipal Court Act, by presiding judges of municipal courts. By the terms of Amended Senate Bill No. 14, the institution of new municipal courts takes place on January 1, 1952 and the new procedure established by such act becomes operative at that time.

In addition to the compensation for municipal judges prescribed by Section 1591, General Code, this same section provides that the presiding judge shall receive an additional five hundred dollars and the chief justice shall receive an additional one thousand dollars.

The method of selecting or designating the presiding judge is prescribed by Section 1589, General Code, which reads:

"In a municipal court having twelve or more judges, one of such judges shall be designated as a chief justice, who shall be elected as such in accordance with section 1587 of the General Code. In a municipal court having two judges, the judge whose term next expires shall be designated as the presiding judge.

"In a municipal court having three to eleven judges, the presiding judge shall be selected by the respective judges of said court on the second Monday of January of the even numbered years."

It will be noted that there are two methods by which the presiding judge is designated or selected. In municipal courts having two judges, such designation is by operation of law, that judge whose term next expires becoming the presiding judge. In other municipal courts having a presiding judge, such presiding judge is selected by all of the municipal judges, such selection being made on the second Monday in January of the even numbered years.

I presume that your question as to the amount of compensation to be received by such presiding judges is intended to raise the question as to the applicability of Section 20, Article II of the Ohio Constitution to the right of such presiding judge to receive, as presiding judge, this additional compensation of five hundred dollars per year. Section 20, Article II of the Constitution reads:

"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."

In Opinion No. 756, Opinions of the Attorney General for 1951, issued September 19, 1951, I held as indicated in the syllabus of such opinion:

"1. The fact that, by the terms of Amended Senate Bill No. 14 (Sections 1581 to 1617, inclusive, General Code), additional *judicial* duties will be imposed upon the incumbent municipal judge of Urbana on and after January 1, 1952 does not have the effect of removing him from the scope of Section 20, Article II of the Constitution, providing that any change in compensation of an officer shall not affect the salary of any officer during his existing term.

"2. The General Assembly, by providing in Amended Senate Bill No. 14 that the existing terms of municipal judges shall not be diminished but shall continue for the period for

which they were created, did not intend to and did not abolish the office of the incumbent municipal judge of Urbana and thus the General Assembly intended to and did recognize that the limitations as to change of compensation contained in Section 20, Article II of the Constitution would forbid any increase in compensation of such judge during his existing term, which term does not expire until December 31, 1953." (Emphasis added.)

You will note that such opinion was limited to a determination of legislative intent as evidenced by the following language:

"It will be noted that Section 1591, General Code, does not specifically provide that the compensation therein prescribed shall be paid to incumbent judges who, by other provisions of the act, continue in office until the end of their existing terms. Neither does it specifically provide that such judges shall not receive the benefits of any increased compensation provided therein. However, it must be presumed that if the provisions of Section 20, Article II of the Constitution would forbid such increase, the General Assembly acted with full knowledge of this fact and did not intend any increase in compensation to affect the salaries of incumbent municipal judges. In this connection, it might be pointed out that in the Ohio legislative history, the General Assembly, in providing for increased salaries, has uniformly followed the practice of simply amending the pertinent salary fixing statute without specifically providing therein that any such increase shall be applicable only to those officers assuming office after the effective date of such change. This same practice was followed by the 99th General Assembly in increasing salaries of the various state elective officers, county elective officers and judges of other courts. Quite obviously, each of such statutes was enacted with the applicable constitutional provision in mind and it was not the legislative intent that such increases in compensation or salary be applicable to increase the compensation or salary of an incumbent during his existing term of office.

"I, therefore, am not confronted with the question of determining the constitutionality of a statute enacted by the General Assembly, which would be beyond my power as an executive officer, but only with the question of determining whether the General Assembly, having in mind its constitutional limitation, intended to increase the compensation of incumbent municipal judges during their existing terms of office."

A question might arise in the minds of some persons even as to the right of a judge elected as municipal judge in November, 1951, who assumes a full six year term on January 1, 1952, to receive such additional payment if selected as presiding judge. (In the case of the election

of two judges, the second assumes office January 2, 1952; in the case of the election of three judges, the third assumes office January 3, 1952, etc.) It might be claimed that such judge, having begun his term of office as municipal judge on January 1, 1952 for the term ending December 31, 1957, could not receive any increase in his salary during his existing term because of the provisions of Section 20, Article II of the Constitution. I do not believe that such claim could be successfully asserted. In the case of State, ex rel. Mack v. Guckenberger, 139 Ohio St., 273, interpreting the provisions of a similar constitutional provision, Section 14, Article IV, the Supreme Court, in effect, held that such a constitutional prohibition is directed against the General Assembly enacting legislation to increase or decrease the salary during term of office and has no application to increases or decreases based upon the happening of events beyond the control of a legislative body. In other words, where the formula was fixed before the assumption of office, the actual amount of compensation received could be affected by events occurring during such term of office.

I believe this same principle clearly would apply to the additional payment of five hundred dollars, even if considered as an increase in salary for the office, received by a newly elected municipal judge on and after the second Monday of January, 1952, upon his selection by his colleagues as presiding judge. This principle would also apply to the termination of payment of such five hundred dollars in case another municipal judge was later selected as presiding judge on the second Monday of January, 1954.

In any event, if newly elected municipal judges could not receive such additional payment of five hundred dollars, such amount could never be paid. To say that Section 20, Article II would preclude such newly elected municipal judges from receiving this additional payment after their selection as presiding judge would be to say that the entire provision for additional payment to presiding judges is unconstitutional which is beyond the scope of my office.

A much more troublesome question, and I believe the basic question involved in your request, is whether the General Assembly intended that municipal judges already in office and continued in office after January 1, 1952 for the full length of the term to which elected are entitled to receive the additional compensation of five hundred dollars if, after January 1,

1952 and during their present terms as municipal judges, they are designated or selected as presiding judges.

In determining such legislative intent, the question to be determined is whether the General Assembly considered that the additional duties imposed on a municipal judge by reason of his designation or selection as presiding judge are duties germane to and within the ordinary scope of the duties of the office of municipal judge, or, whether it considered such duties not germane to and within the scope of such office of municipal judge.

In Opinion No. 756, supra, I stated:

> "While there is authority both within and without Ohio for the proposition that additional compensation may be provided upon the imposition of duties not germane to or within the ordinary scope of the duties of the office, such proposition has no application here. Obviously the additional duties here imposed are all of a judicial nature within the ordinary scope of a municipal judge."

It is stated in 43 American Jurisprudence, at page 152:

> "* * * Where the 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. * * *"

That such principle is almost universally followed by states which have constitutional prohibitions against an increase or decrease of compensation during term of office is evident from annotations on this subject matter contained in 21 A.L.R., page 256.

While it does not appear that the Supreme Court of Ohio has passed directly on this question, lower court decisions have applied this principle in construing the provisions of Section 20, Article II of the Constitution.

The Common Pleas Court of Hamilton County, Ohio held, in the case of State, ex rel. Harrison v. Lewis, 10 O. Dec. 537:

> "The 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 germane 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."

This case was affirmed by the Court of Appeals, the decision being reported in 21 O.C.C., 410.

The Common Pleas Court of Ashtabula County in State, ex rel. Taylor v. Coughlan, 6 O.N.P. (N.S.), 101, applied the same test in arriving at a decision of whether additional compensation provided during term of office violated the provisions of Section 20, Article II, namely, are the duties imposed incident to or germane to the office in question.

In arriving at my conclusion in Opinion No. 756, supra, that the additional duties imposed upon the incumbent municipal judge of Urbana were germane to and within the ordinary scope of the duties of the office of municipal judge of such city, I quoted a portion of the per curiam opinion in Donahey v. State, ex rel. Marshall, 101 Ohio St., 473, at pages 476 and 477. Although, as stated before, this question has not been presented squarely to the Supreme Court of Ohio, it appears that the court, in the Donahey case, supra, gave consideration to this principle as evidenced by the following language appearing at page 477 of the per curiam opinion:

> "No provision of our statutes has been called to our attention which in our judgment imposes new duties upon the relator not within the scope of the purposes and contemplation of the legislature in the creation of the department of which the relator is a member. * * *"

It is, of course, much easier to state the general principle than to apply it in a given case. Are the additional duties imposed upon a municipal judge by reason of his designation or selection as presiding judge duties which are germane to and within the ordinary scope of the duties of a municipal judge? Such additional duties are provided by Section 1600, General Code, which reads as follows:

> "In addition to the exercise of all the powers of a municipal judge, the presiding municipal judge or chief justice shall have the general supervision of the business of the court and may classify and distribute among the judges the business pending in the court. He shall determine the amount and approve the surety and the terms of all official bonds. The presiding municipal judge or chief justice may appoint a qualified substitute to serve

> during the disability of an incumbent of any appointive office created by sections 1610 to 1612, inclusive, of the General Code, who shall be temporarily absent, or incapacitated from acting as such. Any temporary appointee may be dismissed or discharged by said presiding municipal judge or chief justice."

It is clear that a judge, by reason of his election as a municipal judge, would not have any power to classify and distribute among the judges the business pending in the court, to determine the amount and approve the surety of all official bonds, to appoint qualified substitutes to serve during the disability of appointed officers in the office of the clerk and the bailiff during temporary absence or to dismiss or discharge such temporary appointees. In a sense, all of such duties may be said to be in the nature of administrative duties within the judicial branch of the government and upon his designation or selection as presiding judge, a municipal judge, heretofore elected and continuing in office during his present term, would thus be burdened with such administrative duties.

It is my considered opinion, therefore, that such duties are not germane to and within the ordinary scope of the duties of the office of municipal judge and that the additional compensation of five hundred dollars per year provided for presiding judges by Section 1591, General Code, may lawfully be paid to any municipal judge selected or designated as presiding judge whether such judge has assumed his term of office as municipal judge before or after January 1, 1952.

As heretofore stated, the scope of my office in any event does not authorize me to declare a statute, duly enacted by the Gneral Assembly, to be unconstitutional and for such reason by consideration herein is limited to determining the intent of the General Assembly. I believe that the intent of the General Assembly to authorize and permit incumbent judges who hold over during their existing terms beyond January 1, 1952 to receive the additional five hundred dollars upon being selected or designated presiding judges is quite evident from the fact that Section 1589, General Code, provides that in a municipal court having two judges, the judge whose term next expires shall be designated as the presiding judge. In the case of a municipal court having two judges, one judge being elected in November, 1951, the holdover judge necessarily would be "the judge whose term next expires" and, thus, will become the presiding judge on January 1, 1952.

Within the contemplation of the General Assembly, it appears that the offices of judge of the municipal court and presiding judge of such court were regarded as separate and distinct "offices" with different duties and different terms of office. Judges of the municipal court are elected for six year terms. Presiding judges in courts having two municipal judges will serve four and two year terms alternately. Presiding judges in courts having three to eleven municipal judges will serve two year terms as presiding judges.

In conclusion, therefore, it is my opinion that under the provisions of the Municipal Court Act (Sections 1581 to 1617, inclusive, General Code), enacted by the 99th General Assembly by the passage of Amended Senate Bill No. 14, a judge of a municipal court who, on and after January 1, 1952 is designated or selected as the presiding judge pursuant to Section 1589, General Code, is entitled, during his term of office as such presiding judge, to the additional five hundred dollars provided by Section 1591, General Code, although elected judge of a municipal court prior to the enactment of the Municipal Court Act and continued in the office of municipal judge during his existing term of such office by the Municipal Court Act.

Respectfully,

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