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1. TOWNSHIP CLERK — SALARY — TOWNSHIP TRUSTEES MAY NOT INCREASE OR DIMINISH DURING TERM OF OFFICE — SECTION 3308 G.C.
2. SALARY, NEW INCUMBENT — ACTION SUBSEQUENT TO COMMENCEMENT OF CLERK'S TERM VALID WHERE TOWNSHIP TRUSTEES FOR FIRST TIME PROVIDE FOR SALARY.

SYLLABUS:

1. Township trustees in providing for a salary for a township clerk under the provisions of Section 3308, General Code, may not increase or diminish the same during the clerk's term of office.

2. Action on the part of the board of trustees of a township whereby for the first time provision is made for the salary of the new incumbent to the office of township clerk is valid even though such action is subsequent to the commencement of the clerk's term.

Columbus, Ohio, June 9, 1942.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“At the November, 1939 election, a township clerk was elected. He qualified, and assumed the office on January 1, 1940.

On January 12, 1940, at a regular meeting of the board of trustees, a resolution was adopted fixing the salary of the clerk at three hundred and fifty dollars per year for his full term of office.

Previously, for the years 1938 and 1939, the compensation paid the clerk under the provisions of Section 3308, General Code, prior to its amendment, was two hundred and fifty dollars a year.

In January, 1942, the present board of trustees of the township passed a resolution to reduce the salary of the clerk from three hundred and fifty dollars to one hundred and forty-four dollars, a year.

May we respectfully request your opinion on the following question:

Since the amendment of Section 3308, General Code, may the township trustees reduce or increase the salary of the clerk during his term of office?

In case the answer to the above question is in the negative:

Would the action of the Board of trustees on January 12, 1940, establishing the salary at \$350.00 a year be legal; or should the clerk have drawn salary at the rate of \$250.00 a year, which amount was paid during 1938 and 1939?"

Section 3308, General Code, referred to in your inquiry, was amended, effective September 2, 1939, and now reads as follows:

"The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendent; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. Provided, however, in those townships having a budget less than five thousand dollars, the township trustees shall determine the salary of the clerk which in no event shall exceed three hundred and fifty dollars per year; and in townships having a budget of five thousand dollars or over, the clerk shall receive two per cent of the total expenditures of such township in excess of five thousand dollars in addition to the amount above provided in townships having a budget of less than five thousand dollars, provided, however, no township clerk shall receive for his compensation in excess of six hundred dollars in any one calendar year for said services as such township clerk."

Shortly after the adoption of Section 3308, supra, as amended, an opinion was rendered by this office which held that township clerks who were incumbents at the time of the enactment of the foregoing section were subject to the provisions thereof and thereby entitled to any increase in compensation. See opinion No. 749, Opinions of the Attorney General for 1939, page 947.

Technically speaking, and confining my ruling in 1939 to the facts then existent, the opinion serves only as authority for the proposition that the Legislature may provide for an increase in the emoluments of such officer during his term by creating a salary in connection therewith.

In providing for such an additional emolument the salary of the officer is in no manner affected as obviously before the creation thereof there was no salary to affect. Such procedure was deemed to be consonant with the provisions of Article II, Section 20 of the Constitution of Ohio, which 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 the case of *State, ex rel. v. Carlisle, et al.*, 3 O.N.P. (N.S.) 544, the court held, as evidenced by the first branch of the syllabus, that:

“The constitutional inhibition against the increase or diminution of the salary of an officer during his existing term does not render it incompetent for him to accept compensation, fixed by the General Assembly, after he entered upon the discharge of the duties of his office and before the expiration of his term, where no compensation was theretofore provided.”

The same principle was announced in the case of *State v. McDowell*, 19 Neb. 422, wherein it was held:

“That as there was no salary fixed, the act providing for such after his election was not an act either increasing or decreasing the salary.”

Again in the case of *State, ex rel. v. Kennon, et al.*, 7 O.S. 547, the court stated that where an office is created providing for no fees or salary for the incumbents, but not providing that thereafter compensation to them shall be prohibited or precluded and such is not made a condition of the acceptance, there is nothing to prevent them applying for compensation to the Legislature and nothing to prevent that body from awarding it.

In view of the foregoing, it is evident that the first question posed in your inquiry is in no manner controlled by the 1939 opinion above cited. The question now confronting us is not whether the Legislature may increase the emoluments of an office holder by creating a salary in con-

nection therewith, but whether, after legislative provision therefor and the adoption of a resolution fixing the amount thereof, the salary may be changed during the officer's term. With respect to this question it is clear that the prohibitory features of Article II, Section 20 are applicable. After the salary has been determined, it is thereby rendered immutable during the term.

Therefore, in answer to your first question, be advised that the township trustees may not reduce or increase the salary of the clerk during his term of office.

It will be noted that Section 3308 does not, by its terms, make mandatory the grant of a salary for township clerks, but simply vests the township trustees with discretionary power bounded by certain maximum limitations in connection with the amount that they may award. Without action on the part of the township trustees compensation in the form of salary would not be forthcoming.

Hence, in regard to your second question, the rule laid down in Opinion 749, *supra*, is dispositive. The action of the board of trustees on January 12, 1940, establishing the salary of the clerk who took office on January 1, 1940 would be proper, for until such action the office of clerkship occupied by the new incumbent carried no salary emolument and, therefore, no change in connection therewith occurred.

In specific answer to your inquiry, therefore, it is my opinion that:

1. Township trustees in providing for a salary for a township clerk under the provisions of Section 3308, General Code, may not increase or diminish the same during the clerk's term of office.

2. Action on the part of the board of trustees of a township whereby for the first time provision is made for the salary of the new incumbent to the office of township clerk is valid even though such action is subsequent to the commencement of the clerk's term.

Respectfully,

THOMAS J. HERBERT
Attorney General.