

Note from the Attorney General's Office:

1959 Op. Att'y Gen. No. 59-982 was overruled by 1960 Op. Att'y Gen. No. 60-1155.

982

1. COUNTY AUDITOR, ELECTED PRIOR TO SEPTEMBER 10, 1959—NOT ENTITLED TO RECEIVE ADDITIONAL COMPENSATION DURING HIS EXISTING TERM.
2. TAX COMMISSION—MAY APPOINT DEPUTY COUNTY AUDITOR—SUCH CLERK MAY RECEIVE COMPENSATION—ART. II, SEC. 20, OHIO CONSTITUTION, SECTIONS 5731.43 AND 325.02, R.C.

SYLLABUS:

1. A county auditor who began his term prior to September 10, 1959, is not entitled to receive compensation pursuant to Sections 5731.43 and 325.02, Revised Code, in addition to the salary prescribed by Section 325.03, Revised Code, as such would be in violation of the restriction of Section 20 of Article II, Ohio Constitution, against increasing the salary of an officer during his existing term.

2. The tax commissioner may appoint a deputy county auditor to perform such services as are required by Section 5731.43, Revised Code, and such deputy auditor may receive the compensation set by such section.

Columbus, Ohio, December 3, 1959

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

Dear Sir:

I have before me your request for my opinion reading as follows:

“During 1947 the General Assembly enacted Section 5348.2b of the General Code for the purpose of enabling the State Tax Commissioner to appoint agents to perform certain duties in inheritance tax matters.

"This law was of a temporary nature and expired March 1, 1951. (122 Ohio Laws, page 749.) During 1951, the 99th General Assembly of Ohio, in Senate Bill No. 22 re-enacted in Section 5348-2b the same provisions, thereby making them a part of the permanent law of the State.

"In actual operation, the State Tax Commissioner could, and in many instances did, appoint the Auditor of the County as his agent, and it was held at the time the law was originally passed that the compensation therein provided was not an increase in the salary of the County Auditor in such manner as would be prohibited by Article II, Section 20, of the Constitution of the State of Ohio.

"This added compensation which could be paid to the various County Auditors was recognized by the Legislature of the State in numerous amendments to Section 2996 of the General Code, (now Section 325.02, Revised Code) with the overall effect that under certain conditions, certain auditors could or could not receive the added compensation.

"The 103rd session of the Ohio General Assembly has again amended Section 325.02, Revised Code, (House Bill 345, effective September 10, 1959).

"Your office has rendered a number of opinions relative to this matter.

"In view of the fact that every County Auditor in the State of Ohio will be interested in complete clarification of the provisions of law with respect to this matter, we respectfully ask your opinion on the following questions:—

"1. Will County Auditors who were elected at the November, 1958, election and who began a four-year term on the second Monday of March, 1959, be entitled to receive the compensation provided in Section 5731.43, of the Revised Code, (5348-2b, General Code) ?

"2. If your answer to No. 1 is in the negative, would it be permissible for the Tax Commissioner to appoint a Deputy County Auditor to perform to perform such services as are required by Section 5731.43, of the Revised Code, and receive the compensation therein set forth?"

Section 325.02, Revised Code, as effective September 10, 1959, reads :

"The salaries and compensation of county officers provided for by sections 325.03 to 325.09, inclusive, of the Revised Code, shall be in lieu of all fees, costs, penalties, percentages, allowances, and all other perquisites, of whatever kind, which any of such officials collects and receives, except such compensation as is provided by section 5731.43 of the Revised Code."

Section 5731.43, Revised Code, reads:

“To enforce section 5731.42 of the Revised Code, the tax commissioner may appoint agents in the unclassified civil service who shall perform such duties as are prescribed by the commissioner. Such agents shall, as compensation, receive annually four cents per capita for each full one thousand of the first ten thousand of the population of the county and one cent per capita for each full one thousand over ten thousand of the population of the county, as shown by the last federal census, which shall be paid in equal monthly installments from the state’s share of the undivided inheritance tax in the county treasury on the warrant of the county auditor, any other provision of law to the contrary notwithstanding. The amount paid to any agent in the unclassified service for duties performed in inheritance tax matters, as directed by the commissioner, shall not exceed fifteen hundred dollars in any calendar year.”

Prior to September 10, 1959, Section 325.02, Revised Code, read as set forth above except that the words “that county auditors whose terms commence prior to October 1, 1955, shall be entitled to” appeared between the word “except” and the word “such” in that section. In interpreting the effect of the section as it then read on the compensation provided in Section 5731.43, *supra*, my predecessor, in Opinion No. 194, Opinions of the Attorney General for 1957, page 57, held:

“Under the new salary schedule of Section 325.03, Revised Code, a county auditor cannot receive additional compensation under Section 5731.43, Revised Code, except in the case of county auditors whose terms commenced prior to October 1, 1955.”

Since county officers elected in 1954 all took office on the second Monday of March, 1955, the only auditors who could not receive the noted additional compensation were any who were appointed to fill vacancies on or after October 1, 1955. It should be noted, however, that the terms of county auditors which commenced on the second Monday in March, 1955, ended on the second Monday in March, 1959, at the commencement of the terms of those auditors who had been elected in 1958. Thus, county auditors serving from the second Monday in March, 1959, were not entitled, under Section 325.02, Revised Code, as it read prior to September 10, 1959, to the compensation provided by Section 5731.43, *supra*, because their terms *did not* commence prior to October 1, 1955. The question now arises as to whether the present county auditors can receive the compensation provided by Section 5731.43, *supra*, under Section 325.02, Revised Code, as effective September 10, 1959.

There can be no doubt that Section 325.02, *supra*, as it now reads, would allow a county auditor to receive the compensation provided by Section 5731.43, *supra*, in addition to his regular salary (provided by Section 325.03, Revised Code) if such auditor is appointed by the tax commissioner pursuant to said Section 5731.43. The question here arises, however, as to whether the allowance of such additional compensation would be in violation of Section 20 of Article II, Ohio Constitution, reading :

“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)

County auditors who took office on the second Monday in March, 1959, were not entitled to receive the compensation provided by Section 5731.43, *Supra*, pursuant to Section 325.02, Revised Code, as it stood prior to September 10, 1959. Thus, to allow such compensation as of September 10, 1959, for any such auditor, would increase the total compensation allowed him *during his existing term*. The question then is whether compensation allowed under Section 5731.43, *supra*, is within the purview of “salary” as used in Section 20 of Article II, Ohio Constitution, *supra*.

In Opinion No. 387, Opinions of the Attorney General for 1945, page 473, the first paragraph of the syllabus reads :

“1. The words ‘compensation’ and ‘salary’ as used in Section 20 of Article II of the Constitution, are used interchangeably, and when the General Assembly pursuant to the authority of said section, has fixed the compensation of any officer, whether by way of salary or fees or both, any change in such compensation effected by the enactment, amendment of or repeal of any law, shall not operate to increase or decrease the compensation of such officer *during his existing term unless the office be abolished.*”

In Opinion No. 978, Opinions of the Attorney General for 1951, page 825, the second paragraph of the syllabus reads :

“2. Under the provisions of Article II, Section 20 of the Constitution of Ohio, the Legislature may change the per diem compensation of any officer whose total compensation is based upon such per diem payment and who receives no ‘salary’ in the sense of an annual or periodical payment for services dependent upon the time and not on the amount of service rendered. (Opinion No. 387, Opinions of the Attorney General for 1945, page 473, distinguished.)”

In this opinion it was held that the words "compensation" and "salary" are not interchangeable. The conclusion, however, was that a change in compensation may be made *only* if the total compensation was based on a per diem payment and the officer received no fixed "salary" in addition thereto.

Opinion No. 978, *supra*, was cited and followed in Opinion No. 1540, Opinions of the Attorney General for 1952, page 469, in which the syllabus reads:

"1. A board of township trustees of a township having a budget of \$5,000 or over has the power to pay a former township clerk the compensation provided by Section 3308, General Code, for prior years service, having failed to compensate such clerk during his term.

"2. Article II, Section 20, of the Ohio Constitution, prohibits an increase in the compensation of a township clerk of a township having a budget of \$5,000 or over, during the existing term of such clerk, through the increase in the maximum compensation for such office provided by the amendment to Section 3308, General Code, effective September 7, 1959."

Section 3308, General Code, referred to in Opinion No. 1540, *supra*, as amended effective September 7, 1949, had the effect of increasing the maximum amount of compensation a township clerk might receive from \$600.00 per year to \$1200.00 per year, the increase being a percentage of the total expenditures of the township.

My predecessor, in commenting on the syllabus in Opinion No. 978, *supra*, stated in Opinion No. 1540, *supra*, stated in Opinion No. 1540, *supra*, page 475:

"As the syllabus also indicates, the compensation of the officer involved in that case was based entirely on per diem payment. In the present case, however, a township clerk in a township having a budget of \$5000.00 or over is partially compensated by a definite and fixed 'salary' within the meaning of Article II, Section 20 i.e. a compensation dependent upon the lapse of time only, and in nowise dependent upon the amount of services performed. Thus, the compensation of such a clerk includes a base salary of \$350.00 plus two per cent of all expenditures of the township in excess of \$5000.00. Because of this fact, it is my opinion that Article II, Section 20, is applicable in this instance and prohibits an increase in the total compensation of such clerk during his term."

In the case at hand, in addition to the extra compensation involved, a county auditor does receive a fixed salary. (Section 325.03, Revised Code). While this salary is based on the population of the particular county involved, it is based on the population as of the last federal census and so is fixed to that extent. Thus, in accord with the conclusions of my predecessors, as noted above, I am of the opinion that a county auditor who took office on the second Monday of March, 1959, may not receive compensation under Section 5731.43, Revised Code, as such would be an increase in salary during his existing term and in violation of Section 20 of Article II, Ohio Constitution.

Regarding your second question you will note that under Section 5731.43, Revised Code, the tax commissioner may appoint *agents in the unclassified service* who shall perform such duties as are prescribed by the commissioner. In this regard, Section 143.08, Revised Code, reads in part:

“* * *

“(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by sections 143.01 to 143.48, inclusive, of the Revised Code:

“* * *

“(9) The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals, or holding a fiduciary relation to such principals;

“* * *

Section 319.05, Revised Code, reads as follows:

“The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputies. When an auditor appoints or removes a deputy, such auditor shall make a record of such appointment or removal in his office and file a certificate of appointment or removal with the county treasurer, who shall record and preserve it.”

Pursuant to the above-noted sections of law it appears that a deputy county auditor is in the unclassified civil service and thus is eligible for appointment as an agent under Section 5731.43, Revised Code. Further, I can see no bar to such deputy auditor receiving the compensation set by Section 5731.43, *supra*, for serving as such agent.

Answering your specific questions, therefore, it is my opinion and you are advised :

1. A county auditor who began his term prior to September 10, 1959, is not entitled to receive compensation pursuant to Section 5731.43 and 325.02, Revised Code, in addition to the salary prescribed by Section 325.03, Revised Code, as such would be in violation of the restriction of Section 20 of Article II, Ohio Constitution, against increasing the salary of an officer during his existing term.

2. The tax commissioner may appoint a deputy county auditor to perform such services as are required by Section 5731.43, Revised Code, and such deputy auditor may receive the compensation set by such section.

Respectfully,

MARK McELROY

Attorney General