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COUNTY AUDITOR—WHO BEGAN TERM BEFORE OR AFTER SEPTEMBER 10, 1959—ENTITLED TO RECEIVE COMPENSATION IN ADDITION TO SALARY—§§325.02, 325.03, 5731.43, R.C.—ART. II—SEC. 20 OHIO CONSTITUTION 982 OAG 1959—OVERRULED.

## SYLLABUS:

Pursuant to the provisions of Section 325.02, Revised Code, as effective on September 10, 1959, a county auditor who began his term either before or after that date is entitled to receive additional compensation pursuant to Section 5731.43, Revised Code, in addition to the salary provided by Section 325.03, Revised Code; and the payment of such additional compensation to a county auditor who began his term prior to September 10, 1959, is not within the purview of the provision of Section 20 of Article II, Ohio Constitution, prohibiting a change in the salary of an officer during his existing term. (Opinion No. 982, Opinions of the Attorney General for 1959, issued on December 3, 1959, overruled.)

Columbus, Ohio, February 17, 1960

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

Dear Sir:

Your request for my opinion reads as follows:

“On December 3, 1959, you rendered Opinion No. 982, in which you held a County Auditor who began his term prior to September 10, 1959 was not entitled to receive compensation pursuant to Section 5731.43 and Section 325.02, Revised Code, in addition to the salary prescribed by Section 325.03 of the Revised Code.

“On January 6, 1960, in an action brought by one W. T. McCort, as Agent of the Tax Commissioner of Ohio, Vs. Lee Woods, Treasurer of Belmont County, Ohio, (McCort being also the Auditor of Belmont County), Case No. 19210, the Hon. Ross Michener, Judge of the Court of Common Pleas of Belmont County, held that the positions of County Auditor and Agent of the Tax Commissioner of Ohio were not incompatible, and that the court found and determined, by way of a declaratory judgment, that the plaintiff, while serving as County Auditor, is entitled to receive the compensation provided by law for him as Agent of the Tax Commissioner in addition to his salary as County Auditor.

“While I realize that the force of this decision applies only to Belmont County, I have been informed that similar actions are contemplated in other counties throughout the State. Any similar decisions would negate the effect of your above referred to Opinion No. 982.

“That our Examiners may apply a uniform rule in making their examinations in all counties of the State, insofar as it applies to the salaries paid County Auditors, we respectfully request that you either reconsider your opinion as rendered on December 3, 1959, or take such action as is necessary to establish a uniform rule throughout Ohio.

“A copy of Judge Michener’s decision is attached hereto.”

The question here to be decided is whether a county auditor who began his term prior to September 10, 1959, may receive compensation pursuant to Sections 5731.43 and 325.02, Revised Code, in addition to the salary provided by Section 325.03, Revised Code.

Section 325.03, Revised Code, sets the annual compensation of each county auditor on a population basis.

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

“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 as follows :

“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 commis-

sioner. 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."

The above sections, therefore, provide that a county auditor may receive the compensation provided by Section 5731.43, *supra*, in addition to his regular salary. On this question, however, it was held in the first paragraph of the syllabus of Opinion No. 982, Opinions of the Attorney General for 1959, issued on December 3, 1959, as follows:

"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."

Section 20 of Article II, Ohio Constitution, referred to in Opinion No. 982, *supra*, 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 said Opinion No. 982 it was noted that under Section 325.02, *supra*, as existing prior to September 10, 1959, county auditors who took office in March, 1959, could not receive compensation under Section 5731.43, *supra*; that Section 325.02, *supra*, was amended, effective September 10, 1959, to allow a county auditor to receive such compensation; and that this amendment posed the question of a change in salary during existing term as prohibited by Section 20 of Article II, Ohio Constitution.

In Opinion No. 982, *supra*, it was determined that since a county auditor who was in office when the September 10th amendment went into effect received a fixed salary under Section 325.03, *supra*, the allowance

to such auditor of compensation under Section 5731.43, *supra*, would amount to a change in salary during his existing term and would be prohibited by Section 20 of Article II, Ohio Constitution.

In the case of *W. T. McCort as the Agent of the Tax Commissioner of Ohio v. Lee Woods, Treasurer of Belmont County, Ohio*, Court of Common Pleas of Belmont County, decided January 6, 1960, the court ruled that the auditor of Belmont county, as agent of the tax commissioner, was entitled to receive the compensation provided by Section 5731.43, *supra*, in addition to his regular salary. The auditor in this case had taken office in March, 1959.

The opinion in the *McCort case, supra*, stated:

“\* \* \*

“Plaintiff, W. T. McCort, in his petition alleges that he was appointed on September 10, 1959 by Stanley Bowers, Tax Commissioner of Ohio, as Agent under the provisions of Section 5731.43 of the Revised Code; that he is the duly elected, qualified and acting Auditor of Belmont County, Ohio, and that his present term of office began March 9, 1959; that Defendant, Lee Woods, is the duly elected, qualified and acting Treasurer of Belmont County, Ohio. Plaintiff alleges that he has performed the duties as Agent of the Tax Commissioner, as aforesaid, for the month of December, 1959, and drew and issued a warrant in the sum of \$97.50, payable to himself as such Agent for compensation due for the month of December, 1959, which warrant was presented to Defendant for payment and that Defendant failed and refused to honor said warrant for payment by reason of an opinion of the Attorney General of Ohio dated December 3, 1959.

“No question of incompatibility of the offices of County Auditor and Agent for the Tax Commissioner is presented as it has been long generally accepted that such positions are not incompatible. In fact the Statute, Section 325.02 of the Revised Code, as amended in 1955, implies that the position of Tax Agent and County Auditor are compatible.

“The controlling question in this case is whether the compensation provided for the Agent in Section 5731.43 creates an increase in the salary of Plaintiff as County Auditor during his existing term contrary to the provision in the Constitution relating thereto.

“This Court finds no difficulty whatever in determining this question. The duties of the County Auditor are all provided by the Statutes. The duties of the Tax Commissioner and the Agents appointed by him are likewise all provided by Statute. The duties of each are separate and apart from the duties imposed upon the

other. Thus we merely have a situation where one person is holding two positions created by law and there would be little difference from a situation where the County Auditor also operated a farm or some other private business at the same time.

“For the foregoing reasons, the conclusion of the Court is that the positions of County Auditor and Agent of the Tax Commissioner of Ohio are not incompatible; that the position of Agent of the Tax Commissioner is not part of the duties of the County Auditor but is a separate and distinct position; and that the compensation provided for such Agent is not compensation for the position of County Auditor and the payment of such compensation to the Agent, who happens also to be a County Auditor, does not amount to an increase in salary or compensation as such Auditor, and payment of such compensation to such Agent in no way conflicts with the constitutional provision with respect to change of salary during term of Office.

“\* \* \*”

Thus, the decision in the *McCort case, supra*, appears to have been based on the conclusions that the constitutional provision applies only to the salary of the auditor, as such; that the compensation as agent of the tax commissioner is not compensation received in the capacity of county auditor; and that, therefore, the constitutional provision does not apply. This theory, of course, differs with that of Opinion No. 982, *supra*, in which it was concluded that compensation received by a county auditor under Section 325.02 and 5731.43, *supra*, is part of the statutory compensation allowed a county auditor, as such.

In reviewing the theory of the *McCort case, supra*, it is noted that under Section 5731.42, *supra*, the tax commissioner is authorized to appoint “agents.” There is no requirement that the county auditor or any other county officer be named. Further, the duties assigned to an agent are not duties of the county auditor or of any other county officer. Thus, where a county auditor is appointed an agent of the tax commissioner pursuant to Section 5731.43, Revised Code, his employment as such is not related to his official duties as auditor.

On the question of an officer receiving additional compensation for services in an independent employment, it is stated in 32 Ohio Jurisprudence, Section 162, page 1021:

“\* \* \* On 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)

While I cannot agree with the language in the *McCort case, supra*, that "there would be little difference from a situation where the county auditor also operated a farm or some other private business at the same time," and while it might still be argued that the salary of a county auditor is set by both Sections 325.02 and 325.03, Revised Code, and includes payments made pursuant to Section 5731.43, Revised Code, there can be no doubt that payments made under said Section 5731.43 are not made for services rendered as county auditor. I am of the opinion, therefore, that compensation paid to a county auditor under Section 5731.43, *supra*, is not part of his compensation as county auditor.

In view of the authorities cited above and in acord with the ultimate decision of the *McCort case, supra*, it follows that the payment to a county auditor of compensation under Sections 324.02 and 5731.43, Revised Code, in addition to his regular salary is not in conflict with the provision of Section 20 of Article II, Ohio Constitution, prohibiting a change in the compensation of an officer during his existing term. Opinion No. 982, Opinions of the Attorney General for 1959, issued on December 3, 1959, is hereby overruled.

Accordingly, it is my opinion and you are advised that pursuant to the provisions of Section 325.02, Revised Code, as effective on Septmber 10, 1959, a county auditor who began his term either before or after that date is entitled to receive additional compensation pursuant to Section 5731.43, Revised Code, in addition to the salary provided by Section 325.03, Revised Code; and the payment of such additional compensation to a county auditor who began his term prior to September 10, 1959, is not within the purview of the provision of Section 20 of Article II, Ohio Constitution, prohibiting a change in the salary of an officer during his existing term. (Opinion No. 982, Opinions of the Attorney General for 1959, issued on December 3, 1959, overruled.)

Respectfully,

MARK MCELROY

Attorney General